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RAJA SYAHRIR ABU BAKAR & ANOR v. MANJEET SINGH DHILLON & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
B MARY LIM JCA
[CIVIL APPEALS NO: W-02(NCVC)(W)-1640-10-2015,
W-02(NCVC)(W)-1679-10-2015 & W-02(NCVC)(W)-1742-10-2015]
16 JANUARY 2019

C ***TORT:*** *Defamation – Libel – Counsel cross-examined police personnel on allegations of use of violence, abuse and torture on accused persons – Member of Parliament commented in telephone interview on cross-examination carried out by counsel – Comments published in newspaper and broadcasted on television – Whether words uttered defamatory – Whether comments published in newspaper* D *and broadcasted on television defamatory – Whether defence of justification available to Parliament member – Whether defences of reportage, qualified privilege, absolute privilege, fair comment and public interest available to reporter, newspaper and television broadcaster*

E The respondent ('the plaintiff') was the lead counsel for one of the men accused of the murder of a prominent businesswoman, Sosilawati Lawiya ('the Sosilawati murder trial'). In the proceedings, the plaintiff cross-examined two police personnel on allegations of use of violence, abuse and torture on the accused persons. On the same day, a Member of Parliament ('the first defendant') telephoned Utusan Malaysia (M) Bhd F ('the third defendant') and Sistem Televisyen Malaysia Bhd ('the fourth defendant'), offering his views on the plaintiff's earlier cross-examination of the police personnel in the Sosilawati murder trial. The third defendant assigned its journalist ('the second defendant') to carry out the telephone interview of the first defendant. The first defendant commented that, G *inter alia*, (i) in advancing the politics of the opposition, the plaintiff sought to tarnish or vilify the image of Government institutions; (ii) as counsel for Dato' Seri Anwar Ibrahim ('DSAI'), in the opposition leader's sodomy trial, the plaintiff now increasingly followed the tune of the opposition in defaming institutions such as the police and the judiciary; (iii) the plaintiff was DSAI's H weapon or tool in DSAI's whole-scale attacks on public institutions such as the judiciary and the police, so as to incite public hatred of these institutions; (iv) the plaintiff moved the High Court, in the Sosilawati murder trial, several times to institute contempt proceedings against the prosecution; and (v) as a member of DSAI's defence team, the plaintiff also made applications to the court, seeking to publicise the weaknesses of institutions in the I country. Following the telephone interview, the second defendant wrote an article entitled 'Manjeet selalu burukkan Kerajaan' ('the article'), which was published in the Utusan Malaysia newspaper and online. On the same evening, the fourth defendant, which similarly accepted the first defendant's

offer for an interview, (i) aired a clip of the Sosilawati murder trial and the telephone interview with the first defendant; and (ii) displayed a photo of the plaintiff with the caption 'Diselar' ('the broadcast'). The plaintiff found the article and broadcast to be defamatory and subsequently commenced an action, at the High Court, against the first to fourth defendants. The plaintiff argued that he had been (i) seriously injured in his character, credit and reputation; and (ii) in the way of his profession, he had been brought into public scandal, ridicule, odium and contempt, having regard his unblemished record as an upright and very senior member of the Malaysian Bar and the estimation in which he was and had been held in the minds of right-thinking members of Malaysian and international society. Denying the allegations and that the words, article and broadcast complained of were defamatory, (i) the first defendant denied uttering the words published in the article and relied on the defences of justification; while (ii) the second to fourth defendants raised the defences of reportage, qualified privilege, absolute privilege, fair comment and public interest. The High Court Judge ('the HCJ') allowed the claim against the first to third defendants but dismissed the claim against the fourth defendant. The HCJ ordered a total sum of RM350,000 as compensatory damages to be paid; the first defendant to pay RM150,000 while the second and third defendants RM200,000. Hence, the present appeals by (i) the first defendant ('the third appeal'); (ii) the second and third defendants ('the first appeal'); and (iii) the plaintiff against the dismissal of the claim against the fourth defendant ('the second appeal').

Held (allowing second appeal; dismissing first and third appeals)
Per Mary Lim JCA delivering the judgment of the court:

(1) The accuracy of the first defendant's comments, as reported in the article, was not in doubt even if the first defendant did not recall his exact words. The natural and ordinary meaning of the first defendant's comments were indeed defamatory of the plaintiff. The ordinary and reasonable man reading the first defendant's comments would readily form the impression or conclude that the plaintiff (i) had an interest in opposition politics; (ii) was in the habit of utilising underhand or dirty tactics to demean and tarnish the image of public institutions or institutions of the Government, especially the police and the judiciary or had a propensity to make attempts to tarnish the image of these institutions for the sake of opposition politics; (iii) had ulterior motives behind his contempt applications against the prosecution which were not connected with his duty as counsel for his client in the Sosilawati murder trial; and (iv) that the plaintiff acted at the behest of DSAI as he was DSAI's tool for the sole purpose of generating public hatred of these institutions. The ordinary and reasonable man would also understand, from the first defendant's comments, that the plaintiff was a person who was easily manipulated or was capable of being manipulated. (paras 45 & 50)

(2) Such comments of the first defendant, considered in their entirety, taking both the bane and the antidote, and viewed objectively, had attacked the plaintiff's character and reputation, casted aspersions on his integrity and certainly had the tendency to lower his esteem in the eyes of right-thinking members of the public. There was much sting in both the obvious natural and ordinary meanings of the words used as well as in the inference that may be readily made from those comments. The words and comments of the first defendant imputed to the plaintiff dishonourable conduct, motives and a lack of integrity, which virtues were particularly precious to members of the legal profession, and the plaintiff belonged to that fraternity and was a senior member, to boot, having at some time held high office as the President of the Bar Council of the West Malaysian Bar. The comments attributed to the first defendant indeed produced a bad impression on the minds of average reasonable men. (para 51)

(3) The defence of justification is a complete defence if the defendants could establish that the defamatory words were true in substance and in fact. However, such defence has to be specifically pleaded with full and clear particulars of the facts and matters relied on. In considering this defence, s. 8 of the Defamation Act 1957 must be taken into account. Section 8 provides that a defendant who is unable to prove the truth of all the material statements in the alleged libel may nevertheless succeed in the defence of justification where the defendant can show that the words not proved to be true or truthful do not materially injure the plaintiff's reputation. It is the truth of the imputations of the overall statement and not the truth of every word that is material. The first defendant failed in this defence. Furthermore, the facts and circumstances upon which the comments were made displayed a certain measure of callousness, indifference and even recklessness on the first defendant's part. Such conduct was irresponsible and wholly reprehensible, particularly when the first defendant's public office as a Parliamentarian was taken into account. The defence of fair comment was also properly concluded to be unavailable to the first defendant. The first defendant's appeal was therefore without merit and must be dismissed. (paras 54, 55 & 74)

(4) Following the findings that the first defendant's words were defamatory, and since the first defendant's words formed the pith and substance or just about the entire article, the same applied and bound the second and third defendants. The second and third defendants wrote down, reported and published the first defendant's libelous words. In an action for libel, every person involved in defaming the individual remains liable whether that person wrote or merely passed the defamatory article or comment on to the next listener or recipient. In this case, the second and third defendants did not merely repeat the first defendant's defamatory comments of the plaintiff; they had

picked up and singled out parts of the first defendant's comments and given them emphasis with these words 'Ikut rentak pembangkang, fitnah terhadap polis, mahkamah – Gobalakrishnan, Manjeet selalu burukkan Kerajaan'. The second headline of 'Manjeet selalu burukkan Kerajaan' was entirely the second and third defendants' comments, reached after having heard the first defendant's. (paras 75 & 76)

(5) This was not a case of true reportage. No dispute or controversy between the first defendant and the plaintiff, or between any entities for that matter, which dispute was also one of public interest at that material time, was identified by the second and third defendants. Although the Sosilawati murder trial attracted public attention, it was not a licence for the second and third defendants to republish defamatory material which had no public interest element whatsoever. Publishing the proceedings, especially the fact that there was rigorous cross-examination by defence counsel and reported in appropriate language, was entirely different from reporting or republishing material offered by a member of the public, even one who holds the office of a Member of Parliament, that such cross-examination was otherwise motivated or was launched by a counsel who acted on someone other than his client's instruction. The second and third defendants were also not neutral as they had adopted the first defendant's views as being accurate and truthful. Once the second and third defendants have crossed the threshold of neutrality and had adopted the first defendant's comments as theirs, they were obliged to verify with the plaintiff. Responsible journalism means responsible conduct. The factual circumstances simply do not support this defence. The defence of reportage was not available to the second and third defendants. (paras 83-85)

(6) The defences of qualified privilege of a newspaper under s. 12 of the Act, common law qualified privilege and *Reynolds*' qualified defence were not available to the second and third defendants because there was a lack of honest belief in the truth of what was published. The second and third defendants must not be seen to have published the defamatory material recklessly without considering or caring whether it be true or not. If that is found to be the case, then the second and third defendants will 'be treated as if he knew it to be false'. Because of the failure to procure the plaintiff's side of the story on the statements made by the first defendant, it was not possible for them to say that they held an honest belief in what was written and published. (para 107)

(7) The HCJ treated the broadcast as containing two parts. The first part was found to be not defamatory as it contained mere recantation of the proceedings in court. However, insofar as the second part was concerned, the HCJ opined that it must be looked at against the first

part, looked at 'as a whole and objectively and must be read together with the first part' and in so doing, there was no defamation established. The ordinary and reasonable viewer is not necessarily the person who watched both parts. That viewer may only have watched either one of the two parts, and that part may just have been the second part. Is such a person any less the ordinary and reasonable viewer? It surely could not be so. In the context of television and prime time news, there is no opportunity for pauses, replays or rewinds. The fourth defendant must be prepared for the viewer who only views the part complained of and the ensuing question is whether such an ordinary and reasonable viewer, viewing that broadcast, would form a negative and disparaging view or opinion of the plaintiff? Will the plaintiff's reputation, in the circumstances of the broadcast, be lowered in the estimation of such a viewer? If the answer is in the positive, the broadcast is then defamatory. (paras 111 & 119)

(8) The choice of the term was obviously deliberate by the fourth defendant, intending the same to be sensational and headline grabbing of attention following its understanding of the first defendant's comments. The word 'Diselar' was not reasonably capable of any positive meaning, naturally or otherwise. Consequently, it was doubted that an ordinary and reasonable viewer would understand the broadcast to convey the ordinary and natural meaning that the plaintiff was strongly criticised, branded, censured or admonished for doing something wrong or for unbecoming conduct or action. The broadcast was certainly reasonably and objectively capable of the meanings complained of by the plaintiff; it would indeed lower the estimation of the plaintiff in the eyes of the TV audience of the fourth defendant. It was also clear that the broadcast included the first defendant's remarks and comments. Those comments were found to be defamatory by the HCJ. Yet, in the context of the broadcast, the HCJ found those comments were not defamatory when they appeared in the second part of the broadcast when set against the first part of the broadcast. This inconsistent finding was unsustainable in law and on the facts, and plainly wrong. Once the defamatory remarks are reproduced or republished, those responsible for such re-publication of the defamation are equally liable in defamation. Contrary to the HCJ's findings, an ordinary and reasonable viewer would indeed, think worst of the plaintiff after viewing the broadcast. (paras 123-125)

(9) Contrary to the submissions of the fourth defendant, the principal elements of qualified privilege have not been satisfied and the defence was not available to the fourth defendant. The *Reynolds*' principles, have not been met, leaving the single conclusion that the fourth defendant had not practised responsible journalism. For the same reasons, the defence of fair comment, were equally not available to the fourth defendant. The HCJ was plainly erroneous in not properly

evaluating this part of the plaintiff's claim. The claim of the plaintiff against the fourth defendant was proved on a balance of probabilities and therefore ought to have been allowed. (paras 154 & 155)

(10) The sums awarded by the HCJ were fair and adequate. In relation to the fourth defendant, the sum of RM200,000, as awarded against the second and third defendants, should also be ordered against the fourth defendant. (paras 156 & 157)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') ialah peguam utama yang mewakili salah seorang tertuduh yang dituduh membunuh seorang ahli perniagaan terkenal, Sosilawati Lawiya ('perbicaraan pembunuhan Sosilawati'). Semasa prosiding, plaintif menyoal balas dua anggota polis tentang dakwaan penggunaan kekerasan, penderaan dan seksaan terhadap tertuduh-tertuduh. Pada hari yang sama, seorang ahli Parlimen ('defendan pertama') menelefon Utusan Malaysia (M) Bhd ('defendan ketiga') dan Sistem Televisyen Malaysia Bhd ('defendan keempat'), memberi pandangannya tentang soal balas plaintif terhadap anggota polis dalam perbicaraan pembunuhan Sosilawati. Defendan ketiga memberikan tugas kepada wartawannya ('defendan kedua') untuk menjalankan temu bual defendan pertama menerusi telefon. Defendan pertama memberi komen, antara lain, (i) dalam mengetengahkan politik pihak pembangkang, plaintif ingin mencemarkan atau menyerang imej institusi-institusi Kerajaan; (ii) sebagai peguam Dato' Seri Anwar Ibrahim ('DSAI'), dalam perbicaraan liwat ketua pembangkang tersebut, plaintif kian mengikut rentak pembangkang dalam memfitnah institusi-institusi seperti polis dan kehakiman; (iii) plaintif ialah senjata atau alat DSAI dalam serangan besar-besaran terhadap institusi-institusi awam seperti kehakiman dan polis dan membangkitkan kebencian awam terhadap institusi-institusi ini; (iv) plaintif beberapa kali memohon pada Mahkamah Tinggi, dalam perbicaraan pembunuhan Sosilawati, agar memulakan prosiding pengkomitan terhadap pihak pendakwaan; dan (v) sebagai ahli pasukan pembelaan DSAI, plaintif juga membuat permohonan pada mahkamah, untuk menguar-uarkan kelemahan-kelemahan institusi-institusi di Malaysia. Susulan temu bual menerusi telefon tersebut, defendan kedua menulis satu artikel bertajuk 'Manjeet selalu burukkan Kerajaan' ('artikel'), yang diterbitkan dalam surat khabar dan talian Utusan Malaysia. Pada petang yang sama, defendan keempat, yang juga menerima pelawaan untuk temu bual, (i) menyiarkan klip perbicaraan pembunuhan Sosilawati dan temu bual defendan pertama menerusi telefon; dan (ii) memaparkan satu gambar plaintif dengan kapsyen 'Diselar' ('siaran'). Plaintif berpendapat artikel dan siaran tersebut memfitnah dan bersangkutan itu, memulakan satu tindakan, di Mahkamah Tinggi, terhadap defendan pertama hingga keempat. Plaintif menghujahkan (i) watak, kredit dan reputasinya terjejas teruk; dan (ii) dalam profesyennya pula, dia terheret dalam skandal awam, cemuhan, kebencian dan penghinaan, mengambil kira rekodnya yang bersih sebagai seorang ahli Majlis Peguam yang jujur dan sangat lama dan pandangan dan

A pemikiran wajar ahli-ahli persatuan Malaysia dan antarabangsa. Menafikan dakwaan-dakwaan tersebut dan bahawa perkataan-perkataan, artikel dan siaran yang diadukan bersifat memfitnah, (i) defendan pertama menafikan ada mengungkapkan perkataan-perkataan yang diterbitkan dalam artikel tersebut dan bersandar pada pembelaan justifikasi; manakala (ii) defendan B kedua hingga keempat membangkitkan pembelaan pelaporan, perlindungan bersyarat, perlindungan mutlak, komen berpatutan dan kepentingan awam. Hakim Mahkamah Tinggi ('HMT') membenarkan tuntutan terhadap defendan pertama hingga ketiga tetapi menolak tuntutan terhadap defendan keempat. Hakim Mahkamah Tinggi memerintahkan agar sejumlah C RM350,000 dibayar sebagai ganti rugi iaitu defendan pertama perlu membayar RM150,000 manakala defendan kedua dan ketiga RM200,000. Maka timbul rayuan-rayuan ini oleh (i) defendan pertama ('rayuan ketiga'); (ii) defendan kedua dan ketiga ('rayuan pertama'); dan (iii) plaintif terhadap penolakan tuntutan terhadap defendan keempat ('rayuan kedua').

D **Diputuskan (membenarkan rayuan kedua; menolak rayuan pertama dan ketiga)**

Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Ketepatan komen-komen defendan pertama, seperti yang dilaporkan dalam artikel tersebut, tidak diragui jika pun defendan pertama tidak E ingat perkataan-perkataan tersebut secara tepat. Maksud biasa dan semula jadi komen-komen defendan pertama sememangnya memfitnah plaintif. Orang biasa dan munasabah yang membaca komen-komen defendan pertama akan terus berpendapat dan menyimpulkan plaintif (i) berminat dalam politik pihak pembangkang; F (ii) sering menggunakan taktik-taktik kotor dan tipu daya untuk merendahkan dan mencemarkan imej institusi-institusi awam atau institusi-institusi Kerajaan, khususnya polis dan kehakiman atau mempunyai kecenderungan menjalankan usaha-usaha mencemarkan imej institusi-institusi ini demi politik pihak pembangkang; G (iv) mempunyai niat tersembunyi sebalik permohonan-permohonan penghinaannya terhadap pihak pendakwaan yang tiada kaitan dengan tugasnya sebagai peguam yang mewakili anak guamnya dalam perbicaraan pembunuhan Sosilawati; dan (iv) plaintif bertindak atas perintah DSAI kerana dia ialah alat DSAI untuk satu-satunya tujuan menjana kebencian awam terhadap institusi-institusi ini. Orang biasa H dan munasabah juga akan memahami, berdasarkan komen-komen defendan pertama, bahawa plaintif orang yang mudah dimanipulasi atau boleh dimanipulasi.

(2) Komen-komen sedemikian oleh defendan pertama, dipertimbangkan I keseluruhannya, mengambil kira perosak dan penawar, dan dilihat secara objektif, menyerang watak dan reputasi plaintif, memfitnah integriti dan tentu sekali mempunyai kecenderungan merendahkan dirinya pada mata ahli-ahli masyarakat yang berfikiran wajar.

Terdapat banyak sengatan dalam maksud jelas biasa dan semula jadi perkataan-perkataan yang digunakan dan juga inferens yang boleh dibuat berdasarkan komen-komen tersebut. Perkataan-perkataan dan komen-komen defendan pertama mengatakan plaintif bertindak dan bermotif tidak jujur dan tidak berintegriti, yang kesemuanya teramat penting buat ahli-ahli profesyen guaman, dan plaintif ialah ahli golongan ini dan seorang ahli lama, khususnya, pada satu ketika pernah memegang jawatan tinggi sebagai Presiden Majlis Peguam di Malaysia Barat. Komen-komen yang dikaitkan dengan defendan pertama sememangnya memberi gambaran buruk pada minda orang-orang biasa yang munasabah.

(3) Pembelaan justifikasi ialah pembelaan sempurna jika defendan-defendan boleh membuktikan inti pati dan fakta perkataan-perkataan yang memfitnah sebenarnya benar. Walau bagaimanapun, pembelaan sedemikian harus diplidkan dengan butir-butir penuh dan jelas berkenaan fakta dan hal-hal perkara yang dijadikan sandaran. Dalam mempertimbangkan pembelaan ini, s. 8 Akta Fitnah 1957 ('Akta') mesti diambil kira. Seksyen 8 memperuntukkan seorang defendan yang tidak boleh membuktikan kebenaran pernyataan-pernyataan material dalam dakwaan fitnah masih boleh berjaya dalam pembelaan justifikasi jika defendan boleh membuktikan perkataan-perkataan yang tidak dibuktikan sebagai benar tidak, secara material, menjejaskan reputasi plaintif. Ini adalah kebenaran pengataan-pengataan keseluruhan pernyataan dan bukan kebenaran setiap perkataan yang material. Defendan pertama gagal dalam pembelaan ini. Tambahan lagi, fakta-fakta dan hal-hal keadaan yang komen-komen dibuat mempamerkan sifat tidak berperasaan, sikap tidak ambil peduli dan malah kecuaian oleh defendan pertama. Tindakan sedemikian tidak bertanggungjawab dan patut dikeji, khasnya apabila jawatan awam defendan pertama sebagai Ahli Parlimen diambil kira. Pembelaan komen berpatutan yang tidak boleh dijadikan sandaran oleh defendan pertama telah disimpulkan dengan betul. Rayuan defendan pertama, dengan itu, tidak bermerit dan mesti ditolak.

(4) Berikutan dapatan bahawa perkataan-perkataan defendan pertama memfitnah, dan kerana perkataan-perkataan defendan pertama membentuk inti pati dan kandungan atau keseluruhan artikel, dapatan yang sama terpakai dan mengikat defendan kedua dan ketiga. Defendan kedua dan ketiga menulis, melapor dan menerbitkan perkataan-perkataan yang memfitnah defendan pertama. Dalam tindakan fitnah, setiap orang yang terlibat memfitnah seseorang kekal bertanggungan sama ada orang tersebut menulis atau sekadar menyampaikan artikel memfitnah atau komen tersebut kepada pendengar atau penerima seterusnya. Dalam kes ini, defendan kedua dan ketiga bukan sekadar mengulang komen-komen memfitnah oleh defendan pertama terhadap plaintif; mereka memilih dan

A mengasingkan bahagian-bahagian komen-komen defendan pertama dan memberi penekanan pada perkataan-perkataan 'Ikut rentak pembangkang, fitnah terhadap polis, mahkamah – Gobalakrishnan, Manjeet selalu burukkan Kerajaan'. Tajuk berita 'Manjeet selalu burukkan Kerajaan' sepenuhnya komen defendan kedua dan ketiga, B yang dicapai selepas mendengar komen-komen defendan pertama.

(5) Ini bukan kes pelaporan sebenar. Tiada pertikaian atau kontroversi antara defendan pertama dan plaintif, atau antara mana-mana entiti, yang pertikaiannya juga satu kepentingan awam pada masa material, yang dikenal pasti oleh defendan kedua dan ketiga. Walaupun C perbicaraan pembunuhan Sosilawati menarik perhatian awam, ini bukan lesen untuk defendan kedua dan ketiga menerbitkan semula material memfitnah yang tiada apa-apa elemen kepentingan awam. Menerbitkan prosiding ini, khususnya fakta bahawa terdapat pemeriksaan balas ketat oleh peguam bela dan dilaporkan dalam D bahasa yang bersesuaian, amat berbeza dengan melapor atau menerbitkan material yang diberi oleh ahli masyarakat, jika pun dia memegang jawatan sebagai ahli Parlimen, bahawa pemeriksaan balas tersebut sebaliknya didorong atau dilancarkan oleh seorang peguam yang bertindak berdasarkan arahan seseorang yang bukan anak E guamnya. Defendan kedua dan ketiga juga tidak neutral kerana mereka mencedok pandangan defendan pertama sebagai tepat dan benar. Sebaik sahaja defendan kedua melampaui garisan ambang keneutralan dan mencedok komen-komen defendan pertama sebagai komen mereka, mereka wajib mengesahkannya dengan plaintif. Kewartawanan bertanggungjawab bermaksud tindakan bertanggungjawab. Fakta-fakta F keadaan langsung tidak menyokong pembelaan ini. Pembelaan pelaporan tidak tersedia buat defendan kedua dan ketiga.

(6) Pembelaan perlindungan bersyarat surat khabar bawah s. 12 Akta, perlindungan bersyarat bawah common law dan pembelaan bersyarat *Reynolds* tidak terbuka buat defendan kedua dan ketiga kerana G ketiadaan kepercayaan jujur dalam apa-apa yang diterbitkan. Defendan kedua dan ketiga tidak boleh dilihat sebagai menerbitkan material memfitnah dengan cuai; tanpa mempertimbangkan atau mengambil peduli sama ada ini benar atau tidak. Jika ini yang berlaku, defendan kedua dan ketiga 'dianggap mengetahui ini salah'. Atas kegagalan H mendapatkan cerita plaintif tentang pernyataan-pernyataan yang dibuat oleh defendan pertama, tidak mungkin untuk mereka mengatakan mereka mempunyai kepercayaan jujur dalam apa-apa yang ditulis dan diterbitkan.

I **(7)** Hakim Mahkamah Tinggi beranggapan siaran tersebut mempunyai dua bahagian. Bahagian pertama didapati tidak memfitnah kerana mengandungi sekadar pernyataan tidak benar prosiding di mahkamah. Walau bagaimanapun, berkenaan bahagian kedua, HMT berpendapat

ini mesti dilihat sebelah-menyebelah dengan bahagian pertama, dilihat 'secara keseluruhan dan objektif dan mesti dibaca bersekali dengan bahagian pertama'; dan dengan berbuat demikian, tiada fitnah yang terbukti. Penonton biasa dan munasabah tidak semestinya orang yang melihat kedua-dua bahagian. Penonton juga mungkin melihat satu daripada dua bahagian sahaja dan bahagian tersebut mungkin bahagian kedua. Adakah orang sebegini kurang daripada penonton biasa dan munasabah? Sudah tentu tidak. Dalam konteks berita televisyen dan waktu perdana, tiada peluang untuk berhenti, mainan semula atau ulangan semula. Defendan keempat mesti bersedia agar penonton hanya menonton bahagian yang diadukan dan soalan yang timbul ialah sama ada penonton biasa dan munasabah, yang menonton siaran tersebut, akan berpandangan atau berpendapat negatif dan meremeh-remehkan plaintif? Adakah reputasi plaintif, berdasarkan hal keadaan siaran tersebut, direndahkan pada pandangan penonton sedemikian? Jika jawapannya ialah positif, siaran tersebut sememangnya memfitnah.

(8) Pemilihan terma nyata sekali disengajakan oleh defendan keempat, berniat agar disensasikan dan tajuknya menarik perhatian berdasarkan pemahamannya tentang komen-komen defendan pertama. Perkataan 'Diselar', munasabahnya, tidak mempunyai maksud positif, secara biasa atau sebaliknya. Oleh itu, diragui bahawa seorang penonton biasa dan munasabah akan memahami siaran tersebut sebagai menyebarkan maksud, biasa dan semula jadi, bahawa plaintif dikritik hebat, dikecam atau ditegur kerana melakukan perkara salah atau berkelakuan atau bertindak tidak wajar. Siaran tersebut sememangnya, secara munasabah dan objektif, mampu mempunyai maksud-maksud yang diadukan oleh plaintif; ini sememangnya merendahkan plaintif pada mata penonton televisyen defendan keempat. Jelas juga bahawa siaran tersebut menyertakan komen-komen defendan pertama. Hakim Mahkamah Tinggi turut mendapati komen-komen tersebut memfitnah. Namun, dalam konteks siaran tersebut, HMT berpendapat komen-komen tersebut tidak memfitnah apabila kesemuanya terpapar dalam bahagian kedua siaran apabila dilihat sebelah-menyebelah dengan bahagian pertama siaran. Dapatan tidak selaras ini tidak boleh dikekalkan bawah undang-undang dan berdasarkan fakta dan jelas terkhilaf. Apabila komen-komen memfitnah dihasilkan atau diterbitkan semula, mereka yang bertanggungjawab atas penerbitan semula fitnah tersebut sama bertanggungan memfitnah. Bertentangan dengan dapatan HMT, seorang penonton biasa dan munasabah sememangnya akan berfikiran buruk tentang plaintif selepas menonton siaran tersebut.

(9) Bertentangan dengan hujahan defendan keempat, elemen-elemen utama perlindungan bersyarat tidak dipenuhi dan pembelaan tersebut tidak tersedia buat defendan keempat. Prinsip *Reynolds* tidak dipenuhi,

membangkitkan kesimpulan tunggal bahawa defendan keempat tidak mengamalkan kewartawanan bertanggungjawab. Atas alasan-alasan sama, pembelaan komen berpatutan juga tidak terbuka buat defendan keempat. Hakim Mahkamah Tinggi jelas terkhilaf kerana tidak menilai bahagian ini, dalam tuntutan plaintif, dengan betul. Tuntutan plaintif terhadap defendan keempat dibuktikan atas imbangan kebarangkalian dan dengan itu sepatutnya dibenarkan.

(10) Jumlah yang diawardkan oleh HMT adil dan memadai. Berkenaan defendan keempat, jumlah RM200,000, seperti yang diawardkan terhadap defendan kedua dan ketiga, harus diperintah terhadap defendan keempat.

Case(s) referred to:

Adams v. Ward [1917] AC 309 ***(refd)***

Attorney-General v. Manjeet Singh Dhillon [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22 SC ***(refd)***

Carole Caplin v. Associated Newspapers Ltd [2011] EWHC 1567 ***(refd)***

Chalmers v. Payne [1835] 2 Cr M&R 156 ***(refd)***

Charleston v. Newsgroup Newspaper Ltd [1995] 2 AC 65 ***(refd)***

Charleston & Another v. News Group Newspapers Ltd & Another [1995] 2 WLR 450 ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

Chong Swee Huat & Anor v. Lim Shian Ghee t/a L & G Consultants & Education Services [2009] 4 CLJ 113 CA ***(refd)***

D.D.S.A. Pharmaceuticals Ltd v. Times Newspaper Ltd & Anor [1972] 1 QB 21 ***(refd)***

Dato Sri Dr Mohamed Salleh Ismail & Anor v. Nurul Izzah Anwar & Anor [2018] 9 CLJ 285 CA ***(refd)***

Flood v. Times Newspaper Limited [2012] UKSC 11 ***(refd)***

Goh Chok Tong v. Jeyaretnam [1998] 3 SLR 337 ***(refd)***

Gordon Berkeley Jones v. Clement John Skelton [1963] 1 WLR 1362 ***(refd)***

Horrocks v. Lowe [1975] AC 135 ***(refd)***

Jameel v. Wall Street Journal [2006] 4 All ER 1279 ***(refd)***

Joshua Benjamin Jeyaretnam v. Goh Chok Tong [1989] 1 LNS 34 PC ***(refd)***

Leetham v. Rank [1912] 57 SJ 111 ***(refd)***

Lewis and Another v. Daily Telegraph Ltd [1963] 2 All ER 151 ***(refd)***

Lucas-Box v. News Group Newspaper Ltd [1986] 1 All ER 177 ***(refd)***

Malaysian Bar v. Tan Sri Dato' Abdul Hamid Omar [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92 SC ***(refd)***

PP v. Dato' Seri Anwar Ibrahim (No. 4) [1999] 3 CLJ 549 HC ***(refd)***

Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors [2018] 1 LNS 62 CA ***(refd)***

Reynolds v. Times Newspaper Ltd & Others [2001] AC 127 ***(refd)***

Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd [2010] 7 CLJ 885 HC ***(refd)***

Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee [2015] 8 CLJ 477 FC ***(refd)***

Zainur Zakaria v. PP [2001] 3 CLJ 673 FC ***(refd)***

Legislation referred to:
Defamation Act 1957, ss. 8, 9, 11, 12
Federal Constitution, art. 145
Rules of the High Court 1980, O. 78 r. 2

Other source(s) referred to:
Halsbury's Laws of England, 5th edn, vol. 32, p. 348
Jason Bosland, Replication of Defamation under the Doctrine of Reportage - The Evolution of Common Law Qualified Privilege in England and Wales, Oxford Journal of Legal Studies, UNSW Law Research Paper No. 2010-20
Duncan and Neill on Defamation, 3rd edn, p 210

(Civil Appeal No: W-02(NCVC)(W)-1640-10-2015)
For the appellants - Muhammad Shafee Abdullah, Sarah Abishaam, Syahirah Hanapiah & Zahria Eleena; M/s Shafee & Co
For the respondent - Americk Sidhu; M/s Americk Sidhu

(Civil Appeal No: W-02(NCVC)(W)-1679-10-2015)
For the appellants - Americk Sidhu; M/s Americk Sidhu
For the respondent - Liew Teck Huat & Lim Qi Si; M/s Suflan TH Liew & Partners

(Civil Appeal No: W-02(NCVC)(W)-1742-10-2015)
For the appellants - Hasnal Rezua Merican & Muzammil Merican; M/s The Chambers of Kamarul Hisham & Hasnal Rezua
For the respondent - Americk Sidhu; M/s Americk Sidhu

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: 23 NCVC-90-09-2011 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Mary Lim JCA:

[1] These three appeals arose out of a single case in the court below:

(i) Civil Appeal No. W-02(NCVC)(W)-1640-10-2015

(ii) Civil Appeal No. W-02(NCVC)(W)-1679-10-2015

(iii) Civil Appeal No. W-02(NCVC)(W)-1742-10-2015

[2] The appellant in the second appeal, Civil Appeal No. W- 02(NCVC)(W)-1679-10-2015 was the plaintiff who sued four defendants *vide* High Court Civil Suit No. 23NCVC-90-09-2011 for damages based on the tort of defamation. His claim was allowed against all the defendants except the third defendant. Being dissatisfied, the plaintiff has appealed.

[3] The second and third defendants appealed *vide* the first of the three appeals, that is, Civil Appeal No. W-02(NCVC)(W)-1640-10-2015. The first defendant too, has appealed and his appeal is the third of the three appeals, that is, Civil Appeal No. W-02(NCVC)(W)-1742-10-2015.

[4] We heard and considered both oral and written submissions from all parties together with the records of appeal and made the following decision, unanimously:

(i) Civil Appeal No: W-02(NCVC)(W)-1742-10-2015 was dismissed with costs; the decision of the High Court in respect of the first defendant was affirmed;

(ii) Civil Appeal No: W-02(NCVC)(W)-1640-10-2015 was also dismissed with costs; the decision of the High Court in respect of the second and third defendants was affirmed;

(iii) Civil Appeal No: W-02(NCVC)(W)-1679-10-2015 was allowed with costs. The decision of the High Court in respect of the fourth defendant is set aside. The plaintiff's claim was found proved and thereby allowed with an order that the fourth defendant is to pay the plaintiff the sum of RM200,000 as general damages together with interest at the rate of 5% per annum from the date of judgment to the date of realisation.

Background Facts

[5] The facts have been well set out by the learned judge in the grounds of judgment. We will only set out what is required for a better appreciation of the issues raised in these appeals. For that purpose, we will address the parties as they were in the first instance.

[6] The plaintiff was, at all material times, and still is, an advocate and solicitor of the High Court of Malaya. The first defendant was at the material time, a Member of Parliament for the constituency of Padang Serai. The second defendant is a journalist with the third defendant, the proprietor, printer and publisher of one of the national dailies, Utusan Malaysia. The second defendant writes for the "Dalam Negeri" column of Utusan Malaysia. This column covers news which are of public interest and which affect the internal and external relations and security of the country. The fourth defendant is television broadcaster and owner of TV3, a television network.

[7] The plaintiff's case relates to what supposedly happened at a trial before the High Court at Shah Alam of four men accused of the murder of a prominent businesswoman in the local cosmetics industry named Sosilawati bt Lawiya, and three of her companions (Sosilawati murder trial). The plaintiff was the lead counsel for one of the accused.

[8] In the proceedings of the afternoon of 16 August 2011, the plaintiff and another counsel cross-examined two police personnel on allegations of abuse and torture of the accused persons, asking questions on how the police conduct their interrogations and investigations, and on the issue of use of violence. The fourth defendant's journalist who was in court at the relevant time and covering the proceedings, filed a report of the account in court.

[9] In the afternoon of 16 August 2011 at the lobby of Parliament, the first defendant gave an interview to the media where he remarked on the plaintiff's earlier cross-examination of the police personnel in the Sosilawati murder trial. The first defendant then telephoned the third and fourth defendants offering his views on the matter.

[10] The third defendant accepted and the second defendant was assigned to interview the first defendant. The interview took place over a telephone conversation at around 6pm of the same day. Following the telephone interview, the second defendant wrote an article entitled "Manjeet selalu burukkan kerajaan" ("impugned article"). This impugned article was published in the third defendant's Utusan Malaysia on 17 August 2011, in the Dalam Negeri column at p. 8; and in the third defendant's Utusan Malaysia online version, also on 17 August 2011 (see exhs. P4 and P6).

[11] The fourth defendant similarly accepted the first defendant's offer. A broadcast journalist was assigned to return the first defendant's call. The first defendant gave a statement over the phone which was recorded by the fourth defendant. A clip of the murder trial as reported by its journalist and the telephone interview with the first defendant were then aired that same evening on the fourth defendant's prime time news called 'Bulletin Utama'. Both the transcript and the audio-visual recording of the broadcast on 16 August 2011 were exhibited as P5. A photograph of the plaintiff with the caption "Diselar" across the photo was displayed during the broadcast. All this formed "the impugned broadcast".

[12] The plaintiff found both the impugned article and the impugned broadcast and the audio-visual recording to be defamatory. He then sued the four defendants.

[13] At para. 8 of his statement of claim, the plaintiff alleged that:

> 8. The publication of the First Defendant's defamatory comments by the Third Defendant at page 8 of the 'Dalam Negeri' section of the Third Defendant's newspaper and their extrapolation of these comments are reproduced below:
>
> Particulars of Publication of Defamatory Material
>
> Ikut rentak pembangkang, fitnah terhadap polis, mahkamah - Gobalakrishnan
>
> Manjeet selalu burukkan kerajaan
>
> Kuala Lumpur 16 Ogos - Peguambela suspek kes pembunuhan Datuk Sosilawati Lawiya, iaitu Manjeet Singh Dhillon yang mewakili tertuduh pertama, N. Pathmanabhan didakwa sentiasa cuba memburukkan imej institusi kerajaan demi kepentingan politik pembangkang.
>
> Ahli Parlimen Padang Serai, N. Gobalakrishnan berkata, ini kerana Manjeet yang juga peguambela Datuk Seri Anwar Ibrahim dalam kes liwat pemimpin pembangkang itu kini semakin terikut-ikut dengan rentak

pembangkang dalam membuat fitnah terhadap institusi seperti polis dan mahkamah.

"Manjeet ini merupakan senjata Anwar dalam melancarkan serangan ke atas institusi awam seperti mahkamah dan polis supaya kedua-dua entity dibenci rakyat.

Selain itu, taktik kotor Anwar yang digerakkan melalui Manjeet juga bertujuan menunjukkan institusi-institusi awam itu kononnya kini berada di bawah telunjuk Barisan Nasional (BN)," katanya ketika dihubungi di sini hari ini.

Beliau mengulas tindakan Manjeet Singh yang beberapa kali meminta mahkamah mengenakan tindakan menghina mahkamah ke atas pihak pendakwaan kes pembunuhan tersebut.

Selain itu Manjeet yang juga berada dalam barisan pembelaan Anwar dalam kes liwat Penasihat Parti Keadilan Rakyat (PKR), turut melakukan permintaan-permintaan yang cuba menunjukkan kelemahan institusi di dalam Negara.

[14] The plaintiff alleged at para. 9 that:

9. By the said words, the First, Second and Third Defendants *meant and were understood to mean, in the natural and ordinary meaning of the words so used, that the Plaintiff is a person who is in the habit of utilising underhand tactics to continuously demean the institutions of government, in particular the judicial system and the police force of the behest of the opposition leader Datuk Seri Anwar Ibrahim with the sole purpose of enticing public hatred against these institutions.*

10. Furthermore and in addition, the allegations made as aforesaid were designed to impute impropriety on the part of the Plaintiff by falsely and maliciously accusing the Plaintiff of the following:

10.1 That the Plaintiff is predisposed to constantly making attempts to tarnish the image of the institution of government for the sake of opposition politics.

10.2 That the Plaintiff represents Datuk Seri Anwar Ibrahim in the current sodomy trial and has been instrumental in defaming the institutions such as those of the police and the judiciary at the behest of the opposition leader.

10.3 That the Plaintiff is Datuk Seri Anwar Ibrahim's weapon in launching maximum attacks against public institutions such as the judiciary and the police designed to create public hatred against these two entities.

10.4 That the Plaintiff is responsible for the mobilisation of Datuk Seri Anwar Ibrahim's 'dirty tactics' with the purpose of showing that the public institutions referred to are supposedly under the thumb of the Barisan Nasional.

10.5 That the Plaintiff's conduct in the ongoing trial involving Datuk N. Pathmanabhan is designed to show the weaknesses of national institutions.

[15] Specifically against the fourth defendant, the plaintiff alleged at para. 11 that "a substantial part of the entire interview with the first defendant was published by the fourth defendant by way of public broadcast on the TV3 news channel at approximately 8.20pm on 16 August 2011 and was potentially viewed by at least every household in Malaysia". The plaintiff further alleged that the impugned broadcast:

> 11. A .... contained a summary of events which had occurred that morning in the ongoing Sosilawati murder trial at the Shah Alam High Court and included a commentary by the Fourth Defendant followed by a telephonic interview with the First Defendant.
>
> Particulars Of Broadcast Content Commentary
>
> Sementara itu, hujah Manjeet Singh Dhillon yang mengatakan polis bertindak keras terhadap tertuduh - diselar Ahli Parlimen Padang Serai, N. Gobalakrishnan.
>
> Beliau menyifatkan hujah berkenaan, menampakkan usaha peguam itu dalam campur tangan bidang kuasa kepolisan.
>
> Pada masa yang sama, kenyataan itu dijangka diambil peluang oleh pembangkang untuk memanipulasi isu terbabit demi kepentingan politik mereka.
>
> Telephonic Interview with First Defendant
>
> Dan ini adalah untuk menjauhkan polis dari membuat kerja mereka yang sebenarnya, saya nampak ini dari dulu lagi dan ini akan memberi rangsangan mereka yang mahu serang polis misalnya. Tengok ramai di kalangan pembangkang berani serang kerana polis pun terikat dan tertakluk kepada undang-undang.
>
> Further Commentary
>
> Pihak polis katanya, harus dihormati dan diberi kebebasan dalam menjalankan tugasan tanpa terikat kepada mana-mana pihak.

[16] The plaintiff alleged that by reason of the impugned broadcast and commentary together with the telephone interview that the first defendant had given the fourth defendant, the plaintiff had been portrayed:

(i) As a person of disrepute, who possesses the propensity to interfere in the responsibilities and duties of the police force.

(ii) As a person who is easily swayed by the opposition to utilise his prowess at cross-examination of police witnesses in a Court of Law for the purpose of politically manipulating issues.

(iii) As a person who consistently tries to prevent the police from carrying out their responsibilities and who has been instrumental in inciting attacks on the police.

(iv) As a person who has succeeded in instigating the opposition to repeatedly and unlawfully attack the credibility of the police force.

[17] It was the plaintiff's case that he was further defamed when the first and/or fourth defendants "caused the words 'Diselar' to be prominently displayed across a photograph of the plaintiff appearing in the broadcast in question knowing and/or intending this inscribed banner to portray a negative perception of the plaintiff". According to the plaintiff, "having regard to the natural and ordinary meaning of the word" and the manner in which the word was displayed, that it was "designed to be sensational".

[18] The plaintiff claimed that as a consequence of these complaints, he had been "seriously injured in his character, credit and reputation and in the way of his profession, and has been brought into public scandal, ridicule, odium and contempt, having regard to his unblemished record as an upright and very senior member of the Malaysian Bar and the estimation in which he is and has been held in the minds of right-thinking members of Malaysian and international society."

[19] The claim was denied by all the defendants with the first defendant first denying having uttered the words in the impugned article before pleading that the words complained of were not defamatory; that the words complained of were not properly pleaded and identified; and finally relying on the defences of justification and fair comment.

[20] The second and third defendants similarly denied the impugned article was defamatory, and raised in the alternatives defences of reportage, *Reynolds*' qualified privilege, qualified privilege, fair comment, justification, and defences under ss. 9, 11 and 12 of the Defamation Act 1957.

[21] As for the fourth defendant, there was also denial of defamation, and further reliance on the defences of absolute privilege under s. 11 of the Defamation Act 1957, fair comment, qualified privilege and *Reynolds*' public interest defence.

Decision Of The High Court

[22] After a full trial covering some ten days where six witnesses testified, the High Court allowed the claim against the first, second and third defendants but dismissed the claim against the fourth defendant.

Impugned Article

[23] The learned judge first found that the first defendant had indeed uttered the words which were published in the impugned article. At para. 15 of the grounds of decision, the learned judge found that after being taken through each paragraph of the impugned article, the first defendant agreed that "except for the mistakes regarding the plaintiff acting as defence counsel for DSAI", the impugned article "reflected in general the subject of his telephone conversation with the second defendant where he had expressed in general his sentiment. He admitted the quotations were his which reflected his thinking and what he had said to the second defendant." This was

similarly the case in relation to the impugned broadcast. So, there was no suggestion that the impugned article and the impugned broadcast could not be ascribed to him, that they were embellished by the other defendants.

[24] Next, on the first defendant's complaints about the pleadings, this was in three respects. First, that there was a failure to comply with O. 78 r. 2 of the Rules of the High Court 1980 in that the plaintiff had failed to identify and plead which words in paras. 8 to 11A of the amended statement of claim were attributable to the first defendant. The first defendant complained that this failure was fatal as he was unable to put up the defence that he was not the author or publisher of the words complained of. This argument was rejected by the learned judge who found that the first defendant had been identified at para. 6 of the amended statement of claim as the source of the impugned article.

[25] The first defendant's second complaint relied on the decision in *D.D.S.A. Pharmaceuticals Ltd v. Times Newspaper Ltd & Anor* [1972] 1 QB 21 where it was held that a plaintiff cannot simply reproduce the whole impugned article and throw that article at the court without specifying the relevant part complained of. The plaintiff is required to specify the pertinent part of the impugned article and transcript which are said to be defamatory. This argument, too, was rejected by the learned judge who did not find the pleas so generally drafted such as to cause the first defendant embarrassment. The learned judge found that on the contrary, the first defendant had no difficulty in raising defences of justification and fair comment.

[26] As for the first defendant's third complaint, that the plaintiff had failed to plead in the particulars of claim the natural and ordinary meanings of the words complained of, following *Lucas-Box v. News Group Newspaper Ltd* [1986] 1 All ER 177. Again, this was rejected by the learned judge who found sufficient pleas at paras. 9 and 10 of the amended statement of claim.

[27] Moving then to the issue of whether defamation was established, the learned judge proceeded to evaluate the case after reminding herself of the applicable principles, that there are two stages involved in an action for defamation. The first stage being the plaintiff's burden to prove defamation in that the impugned words are capable of or have the tendency of bearing a defamatory meaning, that the words refer to the plaintiff and that there was publication by the defendant. The second stage was the consideration of the defences where the burden is now on the defendants.

[28] On the question of whether the impugned words were defamatory and defamatory of the plaintiff, the High Court answered in the affirmative. The learned judge found that "in essence, the first defendant commented that the plaintiff was preventing the police from carrying out their duties and that he had noticed this of the plaintiff for some time. The first defendant further commented that the plaintiff's behavior would incite those who wanted to attack the police as this was the trend amongst many opposition politicians. In para. 5D, the first defendant's telephone interview ended with the

comment that the police had to be respected and be allowed to carry out their duties without being prevented from doing so by any party." At para. 34 of the judgment, the learned judge reasoned that "after having read the entire impugned article, in the natural and ordinary meaning of the words used, there can be no doubt that no ordinary and reasonable person would find the impugned article as anything else other than defamatory of the plaintiff. The words in the impugned article were capable of bearing the meanings ascribed in paras. 9 and 10 of the SOC."

[29] The learned judge explained further that:

> ... the first thing that comes to light in the mind of an ordinary reasonable person reading the impugned article, is the impression that the plaintiff who was the lead counsel in the Sosilawati murder trial, and who has an interest in the opposition politics, was in the habit of making attempts to tarnish the image of the government institutions for the purposes of advancing the politics of the opposition and using the Court to pursue his hidden agenda.
>
> 35. An ordinary, reasonable person reading the impugned article would also form the impression that the plaintiff was DSAI's tool and he was being used or mobilised to launch maximum assaults on public institutions such as the Courts and the police so as to create public hatred against these two entities. The plaintiff was also a person capable of being manipulated by DSAI to mobilise the opposition leader's dirty tactics with the purpose of showing that those public institutions referred to are under the thumb of the Barisan Nasional. The plaintiff was portrayed in the impugned article as a person who could easily be manipulated and has no mind of his own. The plaintiff's conduct in the Sosilawati murder trial in making applications to move the Court to cite the prosecution for contempt of Court was designed to show the weaknesses of some particular institutions in the country.

[30] The learned judge was in no doubt that the entire impugned article has cast aspersions on the integrity of the plaintiff, is an attack on his character, and that it has the effect of "casting a slur on the plaintiff's character and reputation and has defamed the plaintiff in his professional calling which would have a tendency to excite against the plaintiff the adverse opinion of others and to lower the plaintiff in the eyes of right-thinking members of the public generally.

[31] With this finding, the burden shifted to the defendants to lead evidence on the defences pleaded.

[32] In relation to the defences of justification, fair comment and the statutory defences under the Defamation Act 1957 (Act 286) that were relied on by the first, second and third defendants, the learned judge did not find any of these defences established. In respect of the second and third defendants, the learned judge further rejected the defences of reportage, qualified privilege and *Reynolds*' defence.

[33] Having reached those conclusions, the learned judge awarded compensatory damages of RM350,000, out of which RM150,000 is to be paid by the first defendant and RM200,000 is to be paid by the second and third defendants.

Impugned Broadcast

[34] This is specifically against the fourth defendant. In order to determine whether the impugned broadcast bears or is capable of bearing the defamatory meaning or imputation against the plaintiff as alleged, the learned judge said that the entire transcript of the impugned broadcast and the audio-visual with the word "Diselar" placed across the plaintiff's photograph need to be examined. These were the learned judge's conclusions.

[35] Her Ladyship found that the "first part of the transcript" contained the reports prepared by the fourth defendant's broadcast journalist (DW4) who was in court on the material day, that is, 16 August 2011. According to the learned judge, the plaintiff accepted that there was nothing wrong with this first part of the transcript, and this led the learned judge to conclude that there was nothing defamatory here. The learned judge opined that "any ordinary and reasonable viewer presented with this first part of the impugned broadcast, would form an impression that the plaintiff was putting in the best interest of his client in keeping with the best traditions of the Bar. This is because he is fearless about taking on the police as they, to him, had abused their powers. This part of the broadcast in my view has in fact the tendency to elevate the plaintiff in the estimation of a reasonable right thinking *sic* members of the public."

[36] As for "the second part of the impugned broadcast" which related to paras. 5A to 5C of the statement of claim and where the first defendant's comments were reported with the word "Diselar" displayed across the plaintiff's photograph, the learned judge held that this section of the impugned broadcast "must be looked at as a whole and objectively and must be read together with the first part." According to the learned judge, "the main question to ask is whether it can be said that this section of the impugned broadcast is a reasonable media coverage of the Sosilawati murder trial."

[37] It was the view of the learned judge that "an ordinary and reasonable viewer after being presented with the first part of the broadcast, would relate the first defendant's statement to the cross-examination of the police witness the plaintiff had conducted in the proceedings that day as reported by DW4. The plaintiff's photograph with the words "Diselar" therefore must necessarily mean that the plaintiff was being criticised by the first defendant for the manner in which he conducted the cross-examination. An ordinary reasonable man viewing the photograph would not in my view have a negative perception of the plaintiff to the extent claimed by the plaintiff in his evidence ... An ordinary reasonable viewer who is taken to understand

A that the plaintiff was being criticised by the first defendant for his conduct in carrying out his duties to protect his client's interest where the client is facing a capital punishment, would not think the worse of the plaintiff."

[38] As for the first defendant's comments which were carried in the impugned broadcast, the learned judge held that "an ordinary reasonable B viewer who is taken to understand that the plaintiff was being criticised by the first defendant for his conduct in carrying out his duties to protect his client's interest where the client was facing a capital punishment, would not think worse of the plaintiff."

C **[39]** Finally, the learned judge said that:

> Considering the broadcast as a whole, in its natural and ordinary meaning, part of the transcript that the plaintiff found objectionable do not in my view have the tendency to expose the plaintiff to hatred, ridicule or contempt in the eyes of a reasonable man. Nor would it have the tendency to lower the plaintiff in the estimation of right thinking D members of society generally.

Our Decision

[40] We will deal with the appeals in the following order; first the appeal of the first defendant before turning to the appeals of the second and third E defendant. Thereafter, we will deal with the plaintiff's appeal.

Appeal Of The First Defendant

[41] Our views and decision on this first appeal is absolutely essential since outcome of this appeal obviously impacts on the other two.

F **[42]** Upon careful consideration of the learned judge's reasons and reasoning, the submissions of the parties and the records of appeal, we were of the unanimous view that the first defendant's appeal had no merit. The appeal was consequently dismissed. These are our reasons.

[43] The thrust of the first defendant's submissions is that the words G complained of are not defamatory; and even if they were, there was justification for the comments, and the comments made were fair.

[44] The law on the tort of defamation is fairly well-settled. It is for the plaintiff to establish on a balance of probabilities that the words complained H of are defamatory, that those words refer to the plaintiff, and those words are published - see *Dato Sri Dr Mohamed Salleh Ismail & Anor v. Nurul Izzah Anwar & Anor* [2018] 9 CLJ 285; [2018] 5 MLRA 509. In the instant appeals, the second and third elements are met. It is quite evident from the impugned article that it is the plaintiff, referred to by name, who is the person referred to in the published article.

I **[45]** The accuracy of the first defendant's comments as reported in the impugned article are also not in doubt even if the first defendant does not recall his exact words. What then remains for consideration is the matter of

whether the learned judge is correct in rejecting the first defendant's complaints on the pleadings, and in finding that the impugned article was defamatory for the reasons alleged by the plaintiff.

[46] On the matter of the pleadings, having examined the statement of claim, we agree with the deliberations of the learned judge in all three respects of the first defendant's complaints. The plaintiff's pleas are sufficiently precise and concise for the first defendant to respond; and respond he did, with ease and no embarrassment. This is quite unlike the situation in *D.D.S.A. Pharmaceuticals Ltd v. Times Newspaper Ltd & Anor* where the Court of Appeal in England found the pleas of the plaintiff in that case to be defective and highly embarrassing. The pleas were too general, and the whole long article was impugned "... without picking out the parts which are said to be defamatory" and including parts which were clearly not defamatory.

[47] Further, the plaintiff's claim of what is the natural and ordinary meaning of the first defendant's words which are cited in the impugned article is not confined to what is pleaded at para. 9 but also to that ascribed at para. 10 of the statement of claim. The opening phrase, "Furthermore and in addition" at para. 10 makes that clear, that the meanings at para. 10 is to be read with the natural and ordinary meaning alleged at para. 9. There are no new or other words impugned at para. 10 for the first defendant to contend otherwise.

[48] As for the learned judge's findings that the words used in the impugned article do indeed bear or are capable of bearing the natural and ordinary meaning as claimed, we agree with that conclusion. The learned judge had properly addressed the issue using the objective test and considering the words and the impugned article in its entirety. We have done the same and we have reached the same conclusion as the learned judge.

[49] The following were the first defendant's comments of the plaintiff:

(i) that in advancing the politics of the opposition, he frequently sought to tarnish or vilify the image of government institutions;

(ii) as DSAI's counsel in the opposition leader's sodomy trial, he now increasingly follows the tune of the opposition in defaming institutions such as the police and the judiciary;

(iii) he is DSAI's weapon or tool in DSAI's wholescale attacks on public institutions such as the judiciary and the police so as to incite public hatred of these institutions;

(iv) DSAI's dirty tactics are intended to show that these public institutions are under the thumb of Barisan Nasional;

(v) DSAI's dirty tactics are mobilised through the plaintiff;

(vi) he has moved the court in the Sosilawati murder trial several times to institute contempt proceedings against the prosecution; and

(vii) as a member of DSAI's defence team in the Advisor to PKR's sodomy trial, he has also made applications to the court which seek to publicise the weaknesses of institutions in the country.

[50] We agree with the learned judge that the natural and ordinary meaning of those comments are indeed defamatory of the plaintiff. The ordinary and reasonable man reading the first defendant's comments will readily form the impression or conclude that the plaintiff has an interest in opposition politics, is in the habit of utilising underhand or dirty tactics to demean and tarnish the image of public institutions or institutions of government, especially the police and the judiciary or has a propensity to make attempts to tarnish the image of these institutions for the sake of opposition politics; that the plaintiff has ulterior motives behind his contempt applications against the prosecution which are not connected with his duty as counsel for his client in the Sosilawati murder trial; that the plaintiff acts at the behest of DSAI as he is DSAI's tool for the sole purpose of generating public hatred of these institutions. The ordinary and reasonable man will also understand from the first defendant's comments that the plaintiff is a person who is easily manipulated or is capable of being manipulated.

[51] We have no doubt that such comments of the first defendant, considered in their entirety, taking both the bane and the antidote, and viewed objectively, attack the plaintiff's character and reputation, cast aspersions on his integrity and certainly have the tendency to lower his esteem in the eyes of right-thinking members of the public. There is much sting in both the obvious natural and ordinary meanings of the words used as well as in the inference that may be readily made from those comments - see *Lewis and Another v. Daily Telegraph Ltd* [1963] 2 All ER 151; *Gordon Berkeley Jones v. Clement John Skelton* [1963] 1 WLR 1362; *Charleston v. Newsgroup Newspaper Ltd* [1995] 2 AC 65. We also find that these words and comments of the first defendant impute to the plaintiff dishonourable conduct, motives and a lack of integrity, which virtues are particularly precious to members of the legal profession, and the plaintiff belongs to that fraternity and is a senior member to boot, having at some time held high office as the President of the Bar Council of the West Malaysian Bar. The comments attributed to the first defendant do indeed produce a "bad impression on the minds of average reasonable men" as described by Farewell LJ in *Leetham v. Rank* [1912] 57 SJ 111.

[52] That being the case, we are of the firm judgment that the learned judge was properly within her estimation in finding that the first defendant had defamed the plaintiff, as was the case in *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461.

[53] Moving then to the defences and it is for each of the defendants to prove their respective defences.

[54] First, the defence of justification, a complete defence if the defendants can establish that the defamatory words are true in substance and in fact. Such defence however, has to be specifically pleaded with full and clear particulars of the facts and matters relied on. In considering this defence, s. 8 of the Defamation Act 1957, where it is relied on, as is the case here, must be taken into account. Section 8 provides that a defendant who is unable to prove the truth of all the material statements in the alleged libel may nevertheless succeed in the defence of justification where the defendant can show that the words not proved to be true or truthful do not materially injure the plaintiff's reputation. It is the truth of the imputations of the overall statement and not the truth of every word that is material - see *Chong Swee Huat & Anor v. Lim Shian Ghee t/a L & G Consultants & Education Services* [2009] 4 CLJ 113.

[55] Unfortunately, in the case of the first defendant, he failed in this defence for several reasons. We cannot find any appealable error in the learned judge's reasoning, findings of fact and conclusions of law.

[56] Paragraph 20.3(c) of his defence contains the first defendant's plea of justification, and the details of why and how the comments are true in substance and on the facts. A perusal of para. 20.3(c) shows that the pleas pertain to the plaintiff's applications before the same court trying the Sosilawati murder trial to cite the three Deputy Public Prosecutors [DPPs] who were prosecuting in that murder trial, for contempt. A witness, U Suresh in the Sosilawati murder trial was charged for perjuring in that murder trial. The charge was brought at the Sessions Court. The plaintiff challenged the propriety of those proceedings as being in contempt of court; arguing that such proceedings should not be initiated when the High Court in the Sosilawati murder trial had yet to resolve the question of the credibility of U Suresh through impeachment proceedings.

[57] The plaintiff's applications to cite the DPPs for contempt and to subpoena them were dismissed by the High Court on 12 September 2011. The first defendant claimed that the dismissal was for want of basis and merit; that it was the absolute discretion of the Public Prosecutor under art. 145 of the Federal Constitution to charge; that the three DPPs could not be in contempt as they were merely carrying out the instructions of the PP; that the plaintiff, being a senior practitioner especially in the field of criminal law, ought to have been aware of this position in law. The first defendant thus questioned the motive behind the plaintiff's applications, suggesting that the applications under such conditions were unjustified. Consequently, the plaintiff's applications must be a challenge or attack on the institutions handling such prosecutions. For these reasons, the first defendant was justified in his allegations of the plaintiff.

[58] At the trial, the first defendant testified not on the matters as pleaded at para. 20.3(c). Instead, he related on other matters, on the contempt proceedings against the plaintiff in 1989, the plaintiff's involvement with contempt proceedings against Zainur Zakaria in 1989, the plaintiff's comments to Asia Sentinel and the plaintiff's relationship with Datuk Nallakaruppan - see his witness statement Q&A 13-28. His counsel's cross examination of the plaintiff followed the same lines. This evidence was ignored and we agree with the learned judge's view that the first defendant, and any other party for that matter, is not entitled to rely on the pleadings of another party, here it was the defence of the second and third defendants, to "cure the deficiency in his own pleadings".

[59] As for the matters pleaded in para. 20.3(c), it is an uncontroverted fact that the first defendant was not in court at the material time of the hearing of the plaintiff's applications for contempt against the three DPPs, that is, on 11 August 2011, or even on 16 August 2011. On the afternoon of 16 August 2011, he was in Parliament. Justice Akhtar Tahir, who heard the applications, did not decide on the plaintiff's applications until 12 September 2011; and the grounds were only made available on 26 June 2013 (exh. D23). The impugned comments which form the bedrock of the impugned article were however made on 16 August 2011. With this timeline, there was simply no basis or source upon which the first defendant can claim justification.

[60] In any event, the learned judge examined the grounds of decision of Akhtar Tahir J and found that the judgment "did not support his defence of justification." There were no criticisms of the plaintiff; on the contrary, Akhtar Tahir J observed that "both the defence and the prosecution teams were one of the best that he had come across and both had displayed highest attitude of professionalism as well as upheld the best tradition of the Bar." Akhtar Tahir J also did not find the plaintiff's applications to cite the DPPs for contempt as amounting to "fitnah" or had "menyisihkan undang-undang ke arah lain", or even that the plaintiff was "attacking the police or badgering the prosecution."

[61] We understand that the first defendant, as were the second and third defendants, were in fact summoned and reprimanded by Akhtar Tahir J following his impugned comments; and this was rightly taken into consideration by the learned judge in the plaintiff's defamation claim. Akhtar Tahir J is reported to have told the first defendant that he should not comment on what transpires in an ongoing trial, adding that it was all the more serious as Gobalakrishnan had made untruthful remarks despite not being present at the hearing. His Lordship was quoted to have said: "What I am concerned about is that you have projected that the court can be easily manipulated for political purposes ... It does not mean that we are fools sitting here allowing Deputy Public Prosecutors (DPPs) or defence counsel to do as they like. We go according to the law." - see exh. P9.

[62] We finally must add that the plaintiff's applications, though rare, and his conduct and handling of witnesses, are entirely matters within his professional expertise and skill, especially a counsel of his standing and repute. These matters are not wrongdoings and any departure from acceptable conduct and behavior in court are absolutely within the jurisdiction of the trial judge to adjudge and control. As we have seen, the trial judge did not admonish the plaintiff in any way whatsoever; instead, it was the first, second and third defendants who were summoned by the trial judge and sternly warned off. In any event, the plaintiff's applications and cross-examination of the witnesses cannot provide any backdrop or context of any extent for the first defendant to have commented on the plaintiff in the manner that he did.

[63] As to the defence of fair comment, the first defendant relied on the same factual basis as that used for the defence of justification.

[64] The first defendant complained that the learned judge had misdirected herself on the factual foundation for this defence of fair comment, that Her Ladyship had confused the events of 11 August 2011 where the plaintiff had brought contempt proceedings against the DPPs, with the events of 16 August 2011 where the plaintiff was cross-examining the police witnesses. According to the first defendant, he had relied on the earlier events as justifying his comments, that the public institutions were being attacked in those proceedings and by such action.

[65] With respect, we disagree. The trial judge examined the contempt proceedings separately at paras. 55 to 64. This examination was not merely for the purpose of dealing with the defence of justification but also fair comment. This was with the object of establishing the truth of the events relied on by the first defendant in para. 20.3(c) of his defence. Whether in respect of the defence of justification or fair comment, it is incumbent on the first defendant to show that the facts relied on are true. As we will see, the first defendant failed in establishing the truth of the facts relied on, and that the extent of the failure was such that he could not avail himself of the benefit of s. 9 of the Defamation Act.

[66] Now, in order to succeed, the first defendant will have to establish that the comments, although consisting or including inferences of fact, are actually expressions of opinion which a fair-minded person can honestly make on a matter of public interest and that such opinion is based on true facts. No person, including the first defendant is entitled to suggest or invent facts and then comment upon them, assuming that they are true. If the facts upon which the comments purport to be made do not exist, then this defence fails, as opined by the Privy Council in *Joshua Benjamin Jeyaretnam v. Goh Chok Tong* [1989] 1 LNS 34; [1989] 3 MLJ 1, 3. Context would therefore be relevant.

[67] Further, this defence is lost if the comments are found to be made maliciously. This was explained by the Court of Appeal in *Dato Sri Dr Mohamed Salleh Ismail & Anor v. Nurul Izzah Anwar & Anor* (*supra*):

> If a defendant can prove that the defamatory statement is an expression of opinion on a matter of public interest and not a statement of fact, he or she can rely on the defence of fair comment. The Courts have said that whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment. It is also a requirement that the comment must be based on true facts which are either contained in the publication or are sufficiently referred to. It is for the defendant to prove that the underlying facts are true. If he or she is unable to do so, then the defence will fail. As with justification, the defendant does not have to prove the truth of every fact provided that the comment was fair in relation to those facts which are proved. However, 'fair' in this context, does not mean reasonable. But rather, it signifies the absence of malice. The views expressed can be exaggerated, obstinate or prejudiced, provided they are honestly held. [See, the case of *Dato Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Berhad & Anor* [2014] 3 MLRA 92.

[68] We find that the applicable principles were judiciously appreciated and applied by the learned judge. Although agreeing with the first defendant's contentions that as a Parliamentarian, he was entitled to comment on matters of public interest, the learned judge cautioned that the first defendant was nevertheless required to "get his basic facts right and the basic facts are those which go to the pith and substance of the matter". Specifically, the learned judge concluded that the first defendant chose not to verify his facts or assumptions "because he intended to use those proceedings as a basis for the attack on the plaintiff's reputation in order to get to DSAI."

[69] More significantly, the learned judge found the first defendant "actuated with malice" when he made his charges against the plaintiff, and was actually indifferent to the truth of what he had commented on, so long as he could get to the opposition leader. For the same reasons, s. 9 of the Defamation Act was not available to the first defendant.

[70] We agree with the learned judge. The finding of malice was with basis and we have no reason to disturb such findings of fact. The learned judge had evaluated the entire body of evidence and had heard the testimonies of the plaintiff and the first defendant before concluding that she had no reason not to accept the plaintiff's testimony that he had never known the first defendant.

[71] At the trial, the first defendant made numerous complaints against DSAI which the learned judge chose to ignore as the complaints were not for her consideration. These complaints, nevertheless, evidenced the first defendant's ill feelings towards the opposition leader. The learned judge found that the first defendant was once a supporter of the opposition and a

member of PKR but "for some reason, fell out with the leadership and left the party". Further, the learned judge found that whilst he admitted that he was unsure of the things that he had said about the association of the two, that is, DSAI and the plaintiff, the first defendant nevertheless made unsubstantiated averments about the plaintiff so as to associate the plaintiff with the opposition leader, claiming to have met the plaintiff "a couple of times, probably in early 2000 and probably at DSAI's house when the opposition leader was released from the prison." The learned judge found that it was erroneous of the first defendant to associate the plaintiff with DSAI's defence team and that the correction by the third defendant the following day, did not alter that.

[72] We further agree with the learned judge that the first defendant's comments and charges cannot in any event amount to fair comments. The first defendant could not claim to be an informed reader of the contempt proceedings because nothing was published until much later. He was also not in court at the material time to follow and thereby appreciate the meaning and implications of the proceedings; that as a layperson, he "really had no idea on what was going on in the proceedings" in the Sosilawati murder trial; that he made no verification with the plaintiff or any of the lawyers involved in the trial; and while the Sosilawati murder trial had attracted much public interest, not everything that happened at the trial could be said to be of public interest.

[73] The records further show that on the material day, there was no attack of any kind by the plaintiff or the defence team, of any public institutions, be it the police or the judiciary. Whether in respect of the contempt applications or the conduct of the proceedings in the Sosilawati murder trial, the plaintiff was taking and acting on instructions of his client. He had set about his duty and responsibility of cross-examining a witness(s) on an issue which he, as lead counsel, felt was material and relevant in establishing his client's case, or furthering his client's cause or complaint. The plaintiff's applications to cite the DPPs for contempt and decisions to do so are entirely matters of professional judgment taken together with client's instructions and authority. Any abuse of the proceedings was well within the power and jurisdiction of the relevant judge to deal with, as he or she thinks fit. In this case, the applications were dismissed by Akhtar Tahir J who not only had made the positive comments about the plaintiff as alluded to earlier, but had on the plaintiff's application, summoned the defendants to account for the impugned article.

[74] In our view, the facts and circumstances upon which the impugned comments were made display a certain measure of callousness, indifference and even recklessness on the first defendant's part. Such conduct is irresponsible and wholly reprehensible, particularly when the first defendant's public office as a Parliamentarian is taken into account. We therefore find that the defence of fair comment was properly concluded to

be unavailable to the first defendant. The learned judge was thus correct in allowing the plaintiff's claim against the first defendant. The first defendant's appeal is therefore without merit and must be dismissed.

Appeal Of The Second And Third Defendants

[75] The plaintiff's action against the second and third defendants is in respect of the impugned article. Following the court's findings that the first defendant's words are defamatory, and since the first defendant's words form the pith and substance or just about the entire article, that finding which we have just affirmed, applies and binds the second and third defendants. These defendants wrote down, reported and published the first defendant's libelous words in which case, they are equally liable for defaming the plaintiff. In an action for libel, every person involved in defaming the individual remains liable whether that person wrote or merely passed the defamatory article or comment on to the next listener or recipient - see p. 348 of *Halsbury's Laws of England*, 5th edn, vol. 32:

> Every person who takes part in or procures the publication of a libel is *prima facie* liable jointly and severally for all the damage caused by it. Thus, if a libel appears in a newspaper, the author of the libel and the proprietor, editor printer, publisher and vendor of the newspaper are *prima facie* jointly and severally liable.

[76] In this case, it is pertinent to note that these defendants did not merely repeat the first defendant's defamatory comments of the plaintiff; they had picked up and singled out parts of the first defendant's comments and given them emphasis with these words: "Ikut rentak pembangkang, fitnah terhadap polis, mahkamah - Gobalakrishnan, Manjeet selalu burukkan kerajaan". The second headline of "Manjeet selalu burukkan kerajaan" is entirely these defendants' comments, reached after having heard the first defendant's. Hence, the facts relied on to justify their comments are by reference not to the prevailing events on 16 August 2011 but, other and earlier events.

[77] We are of the view that these comments are equally defamatory of the plaintiff for the same reasons discussed earlier in relation to the first defendant. Learned counsel for these defendants had contended that there are no accusations made against the plaintiff. We cannot agree. The impugned article carries and is capable of the natural and ordinary meaning complained of by the plaintiff. Those complaints are not extreme but entirely reasonable and of merit. This is not a case where one bad meaning is selected where other non-defamatory meanings are available from the impugned words (as was the case in *Goh Chok Tong v. Jeyaretnam* [1998] 3 SLR 337); rather when the impugned article is read as a whole by the reasonable reader who has general knowledge of the political and social standing of the plaintiff, that reader will understand and see that the plaintiff's reputation is indeed disparaged by the impugned article. Contrary to the second and third defendants' contentions, we are of the view that a reasonable reader will read

the impugned article as not mere adoption and republication by them, but as their affirmation of its contents, and that they share the first defendant's views. As pointed out earlier, while we accept that the media such as these defendants to a large extent, depend on headlines, that which was emplaced by these defendants confirm what we have just expressed.

[78] What follows then for consideration is the defences of these defendants, all of which were rejected by the learned judge. These defendants pleaded justification, fair comment, reportage, *Reynold*'s privilege, qualified privilege and ss. 9, 11 and 12 of the Defamation Act 1957. After careful evaluation of the submissions of respective counsel for the second and third defendants and for the plaintiff and the records of appeal and the grounds of decision, we are of the unanimous decision that their appeal too, is without merit.

[79] We pause here to make what we see as a significant point, and that is the order of defence pleaded. Although the learned judge dealt with the defence of justification first before attending to the defences of fair comment, statutory defences, reportage and then qualified privilege, we believe the defence of reportage, perceived as a sub-specie of qualified privilege, should be dealt with first. This defence, if relied on, sits at the top of the best defences a publisher can raise. It is, however, a mutually exclusive plea and difficult to raise as an alternative due to the principles and elements involved. A view to this effect was expressed in the case of *Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors* [2018] 1 LNS 62; [2018] MLJU 34, and we adopt the same here.

[80] We add that this defence should not be given a liberal or broad interpretation given its peculiar attributes, as expressed by Jason Bosland in his paper entitled "*Replication of Defamation under the Doctrine of Reportage - The Evolution of Common Law Qualified Privilege in England and Wales*" published in the Oxford Journal of Legal Studies, UNSW Law Research Paper No. 2010-20:

> The 'doctrine of reportage' - the term by which this particular application of *Reynolds*' privilege has since been known - essentially provides a defence for the republication of allegations originally made by a participant to a dispute or controversy of public interest. Repeating a defamatory allegation, subject to any other defence, would usually give rise to liability on the part of the republisher. Under the reportage defence however, liability will be avoided where the republisher does not adopt or present the repeated defamatory allegation as fact, but instead simply republishes the allegation as part of a story that has the effect of reporting, in the public interest, the fact that the allegation has been made.

[81] This defence of reportage was pleaded at paras. 19 and 24 of the amended defence. It is quite apparent that the learned judge has properly appreciated this defence and its attendant principles; that as explained by the authors, *Duncan and Neill on Defamation*, 3rd edn, p. 210 this defence entails the following:

> 17.20 There may be cases in which the very fact that certain allegations are being made or that a certain controversy exists will constitute a matter of public interest. In such cases, the defendant may be relieved of the normal obligation to seek appropriate verification of the allegations before publishing them. Such reports have been described as 'neutral reportage' and may be protected by *Reynolds*' privilege. However, in reporting in any such case, the defendant will have to exercise great care to preserve an appropriate degree of neutrality if he is to prove successfully that both the publication and its tone were consistent with the duty to act responsibly and fairly.

[82] In other words, for the second and third defendants to succeed on the defence of reportage, they must be merely republishing the first defendant's defamatory words or comments. There is neutrality in their tone and in the manner in which the republication was effected; with no adoption of the views or comments expressed. Republishes are permitted to raise this defence of mere reporting or reportage to a charge of defamation because of the element of public interest involved, that the defamatory comments concern a dispute, controversy or matter of public interest at the material time. This element of public interest and to a large extent, the urgency of the matter, obviates the requirement of verification, particularly with the plaintiff, before the republication is made. Entities such as the second and third defendants see it as their duty and responsibility to record and convey the first defendant's comments out to the public; that the public interest overrides their obligation to verify. This defence reflects and acknowledges responsible journalism.

[83] However, we agree with the learned judge that on the facts, this was not a case of true reportage. No dispute or controversy between the first defendant and the plaintiff, or between any entities for that matter, which dispute was also one of public interest at that material time, was identified by the defendants. In fact, the learned judge found this "basic requirement" not met as "there was never an existing controversy which required reporting to the public at large due to its importance. In fact the first defendant gave the statement to the second defendant unilaterally over the telephone and this was published almost *verbatim* by the second and third defendants."

[84] We cannot agree with the second and third defendants that their reporting on the Sosilawati murder trial, though a trial attracting public attention, meant that it was a licence for them to republish defamatory material which has no public interest element whatsoever. Publishing the proceedings, especially the fact that there was rigorous cross-examination by defence counsel and reported in appropriate language, is entirely different from reporting or republishing material offered by a member of the public, even one who holds the office of a Member of Parliament, that such cross-examination is otherwise motivated or, is launched by a counsel who acts on someone other than his client's instruction.

[85] These defendants were also not neutral as they had adopted the first defendant's views as being accurate and truthful. Once these defendants have crossed the threshold of neutrality and had adopted the first defendant's comments as theirs, they were obliged to verify with the plaintiff. This is particularly so when the second defendant had admitted that there was no urgency in the republication; that it could wait. Responsible journalism means responsible conduct. The factual circumstances simply do not support this defence. The learned judge was consequently entitled to rule that the defence of reportage was not available to the second and third defendants.

[86] The next defence was that of justification which relied on the following facts to justify the impugned article:

(i) Justice Akhtar Tahir's decision in the Sosilawati murder trial that the police investigations in that case was "world class";

(ii) the plaintiff's contempt applications against the DPPs;

(iii) the contempt proceedings against the plaintiff in relation to his statement on Tun Dato Abdul Hamid;

(iv) the plaintiff's statutory declaration in the contempt proceedings against Zainur Zakaria; and

(v) the plaintiff's comments made to John Berthelsen on the Altantuya case in the Asia Sentinel

[87] This defence too, was rejected. These defendants complained that the learned judge failed to have regard to the context in which the impugned article was written and published, that they were merely publishing the first defendant's comments in a criminal trial, the comments of which happened to be of the plaintiff.

[88] At the trial, the second defendant testified that with the first defendant a Member of Parliament and in the interest of democracy, it was his duty to report the type of news, or the first defendant's comments. Learned counsel for the second and third defendants submitted that since the Sosilawati murder trial was perceived as "one of the most high-profile murder cases in Malaysia, possibly even in the world. It has generated a lot of publicity. Comments made in the course of this case by the respondent/plaintiff are guaranteed to attract media and political attention and thus the comment must be neutral and fair. DW3 merely reported Gobala's words. By the paper reporting both sides of the story neutrally, the appellants/defendants aim to inform the public the actual scenario."

[89] As was just expressed, the status of the first defendant and the fact that the criminal trial may have generated substantial interest are by no means free passes to slandering another, it is the duty to speak responsibly. We agree with the learned judge that since the first defendant's telephone interview with the second defendant which was reported and published by

A the third defendant was in connection with the plaintiff's conduct in the Sosilawati murder trial, the context must be so related, that the comments must relate materially to those proceedings and the plaintiff's professional conduct therein. The factual context relied on by these defendants fails in that regard. We add that our earlier observations made in respect of the first B defendant's defence of justification apply equally to the second and third defendants.

[90] The second and third defendants were summoned by Akhtar Tahir J over their publication of the impugned article. What transpired in court was carried in the New Straits Times on 27 August 2011 - exh. P36, the accuracy C of which is not in issue. Akhtar Tahir J is reported to have said in those proceedings as follows:

> I summoned you both to inform you that you should not have published this article and make comments on the ongoing trial. Some of the applications you touched on, I haven't even made my decision. Do you D know you are not supposed to write or discuss about the case?
>
> Raja Syahrir, who had been with the daily for four years, said "yes".
>
> Akhtar: So you knew but you still published it anyway?
>
> Raja Syahrir: I thought it was fair comment and did not know that it E would lead to contempt of Court.
>
> Aziz who said he had been with the publication for 27 years, also had he had no intention to be held in contempt.
>
> Akhtar pointed out that the two newsmen were not even present during the proceedings, adding that what they were reporting was inaccurate.
>
> F "You want to discuss or comment the matter at a coffee shop, go ahead but you cannot publish it in the newspapers," he said, adding they could only report what transpired in Court.
>
> He said the article not only attacked Manjeet but also the Court, making it look like the Court could be used as a political arena.

G **[91]** Both defendants were thereafter "let off with a warning". We find it difficult under such circumstances, to agree with the second and third defendants that they were justified in writing the impugned article. The impugned article carried and contained untruths from the first defendant which these defendants perpetrated quite irresponsibly and without H justification.

[92] It is interesting to note that the second defendant had testified that he honestly believed that what he had written was true and accurate because of his own working knowledge of the plaintiff's background. He claimed that I he in fact, shared or held the same opinion of the plaintiff as did the first defendant. Now, since the impugned article has been proven to be defamatory, the second phase kicks in for the defendants to prove that the

contents of the impugned article are substantially true. It is not enough that the defendants believed the allegations are true, the facts upon which the belief has arisen and not the belief itself, must now be proved to be true.

[93] The learned judge questioned the second defendant's claim of working knowledge as one without basis. At paras. 76 and 77 of the judgment, the learned judge found that the "working knowledge" that the second defendant talked about was actually what he had learned or gathered from reading newspaper reports, articles and cases which the plaintiff was involved in. When tested, the second defendant's working knowledge was found sorely wanting. The second defendant had also claimed to be conversant with the Tun Salleh Abas' case. Yet, the learned judge found that the second defendant was actually unaware of the existence of a dissenting judgment in that case, that there were many related events that put paid to their contentions.

[94] As for his knowledge of the Sosilawati murder trial, the trial judge found that the second defendant had admitted that he was actually not reporting on the Sosilawati murder trial at any stage, that the impugned article was in fact his first article on the murder trial, that he did not even know whether the first defendant was present in court during the murder trial, that he relied entirely on the first defendant for the statement, and, that he "would not have known all the things that the first defendant was ignorant of."

[95] Her Ladyship expressed "serious doubts as to the extent of the second defendant's working knowledge to sustain his knowledge of *sic* the all the cases the plaintiff was involved in and about the plaintiff himself from his testimonies in court whilst under cross examination and even re-examination, it is obvious to me that his actual working knowledge did not go that far as what was in his pleadings and what was contained in his witness statement."

[96] These are very serious observations that the learned judge could only have validly arrived at after fully examining the details relied on, and after having heard the testimonies of these defendants. On our part, we find ourselves in full agreement with the learned judge after examining the records of appeal.

[97] These same observations led the learned judge to draw a very significant inference, that there was malice on the part of the second and third defendants. After hearing the evidence of these defendants, and comparing their evidence with the materials relied on, the learned judge concluded that it was simply not possible for the second defendant to claim that he had an honest belief in the plaintiff's background and shares the first defendant's comments. The learned judge specifically found that the impugned article had no relation with the proceedings in the Sosilawati murder trial, that these defendants were reckless to the truth of the contents of what they were about to publish. These defendants knew that they were in no hurry to publish; yet,

they chose not to verify with the plaintiff so as to obtain his view or to at least check "the facts" and maintain some measure of neutrality. These findings are with basis and reason. We, thus, see no merit in disturbing that decision.

[98] Despite these concerns and the findings of malice, the learned judge proceeded to carefully consider and evaluate every factual basis that was relied on by the second and third defendants. This is evident from paras. 78 to 104 of the grounds of decision. After undertaking that exercise, the defendants were still found to have failed in their defence. We have no hesitation in agreeing with the learned judge. We found the learned judge's deliberations and conclusions in this respect both sound in law and correct on the facts.

[99] Dealing with the second and third defendants' reliance on Akhtar Tahir J's findings as justifying their impugned article that the plaintiff's action in demeaning the government institutions was unwarranted and defamatory of the police force, the learned judge was quite correct in finding that these defendants had omitted citing certain parts of the judgment. Not only did Justice Akhtar say that the police investigation in the Sosilawati murder case "although ... was not textbook perfect and it can never be, it was nevertheless a world class investigation carried out with the utmost care and precision", he had also acknowledged that the "defence and prosecution teams were one of the best I have come across and both displayed highest attitude of professionalism as well as upheld the best tradition of the Bar. Arguments, submissions and examinations were of the highest quality and greatly assisted me in making a reasoned decision." The plaintiff's applications for contempt against the DPPs were never perceived, especially by the trial judge in the murder trial, to be anything but professional and within the rights of the accused and as part of the conduct of his defence to the serious charge of murder. Thus, when all the relevant parts of Akhtar Tahir J's judgment are read, these defendants' defence of justification is readily demolished.

[100] We similarly agree with the learned judge' findings that just because the plaintiff has a previous conviction for contempt of court for scandalising the court, there was no basis for the defendants' contention that the plaintiff was in the habit of doing so. In fact, subsequent events negated these defendants' contention.

[101] The earlier contempt proceedings against the plaintiff arose from an affidavit that he had affirmed in his capacity as Secretary of the Malaysian Bar on 25 April 1989 and filed in support of the Bar's application for leave to commit the then Lord President of the Supreme Court, Tun Hamid bin Omar - see *Malaysian Bar v. Tan Sri Dato Abdul Hamid Omar* [1989] 2 CLJ 373; [1989] 1 CLJ (Rep) 92. Although the plaintiff was found guilty for contempt (*Attorney General v. Manjeet Singh Dhillon* [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22), and the Malaysian Bar continued to oppose the Lord

President, the plaintiff who had by then become the President of the Bar, took the view that the Bar had to move on. The plaintiff was reported to have urged reconciliation and had made "an impassioned plea to members to recognise and acknowledge the position of Hamid as Lord President", and to accord the Lord President the respect and courtesy that was due to his office; this plea was rejected following a vote. This led to the plaintiff's resignation as President of the Bar - see for instance exhs. P13, P14, P15, P18, P19, P20.

[102] We also agree with the learned judge's view on the plaintiff's statutory declaration [SD] in the contempt proceedings against Zainur Zakaria. Again, the learned judge found that the second and third defendants were unaware and unfamiliar with the actual events in that case, that they had not read the related judgment as reported in *Zainur Zakaria v. PP* [2001] 3 CLJ 673; [2001] 3 MLJ 604 (exh. P25) and the observations of Abdul Malek FCJ and Steve Shim CJSS which revealed that the reliance on this event was baseless and really an afterthought.

[103] The SD (exh. P40) pertained to a private letter dated 12 October 1998 (exh. P51) that the plaintiff wrote to the then AG, Tan Sri Mohtar Abdullah. The plaintiff explained that the letter was shown to one of the lawyers acting for DSAI but it was used in DSAI's trial without his consent. This letter and the plaintiff's SD became the subject matter of contempt proceedings initiated against Zainur Zakaria - see *PP v. Dato' Seri Anwar Ibrahim (No. 4)* [1999] 3 CLJ 549. Messrs Zainur Zakaria & Co had filed a motion on behalf of DSAI for orders that two named Senior DPPs be prevented, prohibited or discharged from prosecuting in that case against DSAI. The motion was supported by an affidavit affirmed by DSAI and based on the plaintiff's SD and letter.

[104] The motion was struck out by Augustine Paul J after it was found to be contemptuous. The counsel, Zainur Zakaria was then found guilty of contempt and sentenced to three months' imprisonment. Augustine Paul J then issued a warrant of arrest for the plaintiff to appear before him. The plaintiff appeared voluntarily and after the plaintiff tendered his apology, the warrant was cancelled. Those proceedings were carried in the third defendant's own reports on 2 December 1998 (exh. D37] and 3 December 1998 (exh. P44), which reports the learned judge found the defendants themselves had failed to appreciate.

[105] As for the plaintiff's comments made to John Berthelsen on the Altantuya case and appearing in the Asia Sentinel under article entitled "Altantuya Killer's Appeal Up Soon" - exh. D2, we cannot fault the learned judge for her findings that the plaintiff's comments do not carry the imputation suggested by the defendants. The second defendant had also admitted to having very little in depth knowledge of the plaintiff's comments in this article thus leaving the defendants in no position to hold any belief as claimed.

[106] The defendants' defence of justification was quite correctly ruled to be without merit, and thereby properly rejected. We find the same to hold true in respect of the defences of fair comment, and reliance on ss. 9 and 11 of the Defamation Act 1957. The impugned article cannot by any argument, be held out to be a fair, accurate and contemporaneous report of the proceedings in court on the material date. Neither of the first three defendants were in court at the material time, especially the first defendant, upon whom the second and third defendants depend for the accuracy of their account in the impugned article. Section 11 can only be available if the report in the article is accurate. The learned judge had quite rightly found, as Akhtar Tahir J had found, that the contents of the impugned article were inaccurate. Consequently, we were compelled to dismiss the second and third defendants' submissions in this regard.

[107] Further, we agree with the learned judge that the defences of qualified privilege of newspaper under s. 12 of the Act, common law qualified privilege and *Reynolds*' qualified defence were not available to the second and third defendants because there was a lack of honest belief in the truth of what was published. This belief is one of the requisite elements as expressed by Lord Diplock in *Horrocks v. Lowe* [1975] AC 135. The defendants must not be seen to have published the defamatory material "recklessly; without considering or caring whether it be true or not". If that is found to be the case, then the defendants will "be treated as if he knew it to be false". The learned judge had found that because of the failure to procure the plaintiff's side of the story on the statements made by the first defendant, it was not "possible for them to say that they held an honest belief in what was written and published."

[108] We are in full agreement with the learned judge that with the circumstances and facts as determined by the learned judge and as discussed earlier, the impugned article was not a "piece of responsible journalism" to which the courts can properly afford protection and uphold the defences pleaded. The plaintiff's claim against the second and third defendants was therefore properly allowed and these defendants' respective appeal is without merit.

The Plaintiff's Appeal

[109] This brings us to the final appeal, and that is the plaintiff's appeal against the learned judge's findings that the impugned broadcast was not defamatory.

[110] After considering the arguments and the law, we were unanimous in our conclusion that the learned judge had plainly erred in this regard.

[111] As pointed out earlier, the learned judge had treated the impugned broadcast as containing two parts. The first part was found to be not defamatory as it contained mere recantation of the proceedings in court on the material date. This was acknowledged by the plaintiff. However, insofar

as the second part was concerned, the learned judge opined that it must be looked at against the first part, looked at "as a whole and objectively and must be read together with the first part"; and in so doing, there is no defamation established.

[112] According to the learned judge, "an ordinary and reasonable viewer after being presented with the first part of the broadcast, would relate the first defendant's statement to the cross-examination of the police witness the plaintiff had conducted in the proceedings that day as reported by DW4. The plaintiff's photograph with the words "Diselar" therefore must necessarily mean that the plaintiff was being criticised by the first defendant for the manner in which he conducted the cross-examination. An ordinary reasonable man viewing the photograph would not in my view have a negative perception of the plaintiff to the extent claimed by the plaintiff in his evidence ... An ordinary reasonable viewer who is taken to understand that the plaintiff was being criticised by the first defendant for his conduct in carrying out his duties to protect his client's interest where the client is facing a capital punishment, would not think the worse of the plaintiff." Considered as a whole, the learned judge did not find the complained part of the transcript to have the natural and ordinary meaning and effect of exposing the plaintiff to "hatred, ridicule or contempt in the eyes of a reasonable man. Nor would it have the tendency to lower the plaintiff in the estimation of right-thinking members of society generally."

[113] With respect, we must disagree for the following reasons.

[114] Her Ladyship understood the impugned broadcast to incorporate the transcripts and the audio-visual components. The transcripts read as follows:

VT Insert

Kamay

Perbicaraan Kes Bunuh Jutawan Kosmetik - Datuk Sosilawati Lawiya Dan 3 Yang Lain.

Aza

Keupayaan Seorang Pegawai Polis Dari Unit Bantuan Teknikal D-nine Yang Mengambil Masa Kira-kira 15 Minit Untuk Menyelesaikan Soal Siasat Terhadap Tertuduh Ke-2 Thilaiyalagan...

Dan 45 Minit Bagi Tertuduh Ke-4 - Kathavarayan 11 September Tahun Lalu Dipersoal Pihak Pembelaan.

Kamay

Ia, Selepas Saksi Memaklumkan Dia Bersama 13 Lagi Pegawai Bawahnya Tidak Mempunyai Pengalaman Khusus Atau Teknik Tertentu dalam Menyoal Siasat Saksi.

Wait For Cue

Ingested Sosila Pagi/Sosila Petang 160811

– cw saksi pakai baju kemeja biru, tali leher –

Perkara Itu Dimaklumkan Cif Inspektor N. Govindan Ketika Disoal Balas Peguam - Manjeet Singh Dhillon Ketika Perbicaraan Dalam Perbicaraan Siang Tadi ...

– cw manjeet, peguam ikat rambut beruban –

Yang Mempertikaikan Kaedah Soal Siasat Digunakannya Sehingga Berjaya Mendapatkan Maklumat Dari Tertuduh Dalam Masa Singkat.

Walhal Sebelum Itu - Pegawai Penyiasat Yang Lain Mengambil Masa Sehingga 2 Jam Untuk Menyoal Tertuduh Tanpa Mendapat Sebarang Maklumat.

SLIDE

– (Letak muka manjeet)

"Aston : Saya cadangkan terdapat unsur kekerasan dan paksaan dalam soal jawab "Kamu setuju atau tidak?

Manjeet Singh Dhillon / Peguam

Tidak Puas Hati Dengan Jawapan Diberikan - Manjeet Kemudian Mencadangkan Terdapatnya Unsur Kekerasan Dan Paksaan Dalam Sesi Soal Jawab Itu...

Slide

– (Letak muka manjeet)

"Aston : Saya tidak setuju dengan cadangan itu. Jika saya buat saya akan mengaku kepada mahkamah"

Cif Inspektor N. Govindan / Saksi

NAMUN DINAFIKAN GOVINDAN

SLIDE

– (Letak muka manjeet)

"Aston : Tiada sebarang kekerasan seperti dakwaan tertuduh sebelum ini seperti mencubit kemaluan, memukul dengan hos getah dan mengacukan pistol dibuat ketika sesi soal jawab berlangsung"

Cif Inspektor N. Govindan / Saksi

– cw saksi pakai baju kemeja biru, tali leher -

Dia Yang Sudah Berkhidmat Bersama PDRM Selama 25 Tahun Juga Menyangkal Dakwaan Tertuduh Sebelum Ini ...

Terdapat Kekerasan Seperti Mencubit Kemaluan, Memukul Mereka Dengan Hos Getah Dan Mengacukan Pistol Ketika Sesi Soal Jawab Itu Berlangsung.

Berbicaraan Dihadapan Hakim - Datuk Akhtar Tahir Bersambung Khamis.

Ends.

Readover

Kamay

Sementara Itu, Hujah Manjeet Singh Dhillon Yang Mengatakan Polis Bertindak Keras Terhadap Tertuduh - Diselar Ahli Parlimen Padang Serai, N. Gobalakrishnan

Aza

Beliau Menyifatkan Hujah Berkenaan, Menampakkan Usaha Peguam Itu Dalam Campur Tangan Bidang Kuasa Kepolisan

Pada Masa Sama, Kenyataan Itu Dijangka Diambil Peluang Oleh Pembangkang Untuk Memanipulasi Isu Terbabit Demi Kepentingan Politik Mereka.

– pause –

– Rollvt –

Ingest Pin Gobala

*buat slide running visual kat court ke

Super: N Gobalakrishnan/Ahli Parlimen Padang Serai In:000354

Dan Ini Adalah Untuk Menjauhkan Polis Dari Membuat Kerja Mereka Yang Sebenarnya, Saya Nampak Ini Dari Dulu Lagi Dan Ini Akan Memberi Rangsangan Mereka Yang Mahu Serang Polis Misalnya. Tengok Ramai Di Kalangan Pembangkang Berani Serang Kerana Polis Pun Terikat Dan Tertakluk Kepada Undang2

Out:000421

– continue –

Kamay

Pihak Polis Katanya - Harus Dihormati Dan Diberi Kebebasan Dalam Menjalankan Tugasan Tanpa Terikat Kepada Mana-mana Pihak.

Ends.

[115] The particular parts of the broadcast that were impugned are as follows:

- Sementara itu, hujah Manjeet Singh Dhillon yang mengatakan polis bertindak keras terhadap tertuduh - diselar Ahli Parlimen Padang Serai, N Gobalakrishnan.
- Beliau menyifatkan hujah berkenaan, menampakkan usaha peguam itu dalam campurtangan bidang kuasa kepolisan.
- Pada masa sama, kenyataan itu dijangka diambil peluang oleh pembangkang untuk memanipulasi isu terbabit demi kepentingan politik mereka.
- *Dan ini adalah untuk menjauhkan polis dari membuat kerja mereka yang sebenarnya, saya nampak ini dari dulu lagi dan ini akan memberi*

A *rangsangan mereka yang mahu serang polis misalnya. Tengok ramai di kalangan pembangkang berani serang kerana polis pun terikat dan tertakluk kepada undang-undang.*

- Pihak polis katanya - harus dihormati dan diberi kebebasan dalam menjalankan tugasan tanpa terikat kepada mana-mana pihak.

B **[116]** The underlined parts of the impugned transcript (at para. 113 above] and the highlighted portion at para. 114 are the *verbatim* remarks or comments of the first defendant. The rest of the parts of the impugned broadcast are the fourth defendant's comments on the first defendant's remarks or comments. As the comments of the fourth defendant are being C broadcasted, the plaintiff's photo is freeze-framed with the word "Diselar" added over the photo. An audio-visual copy of the impugned broadcast was produced at trial and in the appeal records/submissions.

[117] The difficulty we have with the decision of the learned judge is not so much with the approach that was adopted to determine the question of D whether there is defamation - that the complained texts, photograph and the word "Diselar" had to be looked at holistically. Rather, it is in her evaluation, application of the principles and the conclusions drawn. Having said that, we remind ourselves that in the context of live TV coverage as is the case in the present appeal, holistically may have more than one meaning E or imputation, and it is not necessarily that which was favoured by the learned judge.

[118] In the learned judge's mind, "an ordinary and reasonable viewer" is the viewer who actually watches both parts, that such a viewer would thereafter relate what is seen and heard in the second part to the first part. F Having connected or related the two parts, the ordinary and reasonable viewer would then understand that the plaintiff was simply being criticised over his cross-examination of the police witness. Such criticism is to be expected and is said not to lower the estimation of the plaintiff in the eyes of the ordinary and reasonable viewer.

G **[119]** With respect, this factual context is somewhat contrived. The ordinary and reasonable viewer is not necessarily the person who watched both parts. That viewer may only have watched either one of the two parts, and that part may just have been the second part. Is such a person any less the ordinary and reasonable viewer? We believe that surely cannot be so. In the context H of television and primetime news, there is no opportunity for pauses, replays or rewinds. The fourth defendant must be prepared for the viewer who only views the part complained of and the ensuing question is whether such an ordinary and reasonable viewer, viewing that impugned broadcast, form a negative, disparaging view or opinion of the plaintiff? Will the plaintiff's I reputation, in the circumstances of the impugned broadcast, be lowered in the estimation of such a viewer? If the answer is in the positive, then the impugned broadcast is defamatory.

[120] At the High Court, the word "Diselar" was understood to mean "strongly criticised" - see DW6's evidence; DW6 testified for the fourth defendant. According to the learned judge, *Kamus Dewan* (Edisi Keempat) construes the term "selar" to mean "mengecam, membidas (dengan kerasnya)". *Kamus Dewan* (Edisi Keempat) defines the word "diselar" as follows:

> ... mengecap (dgn kata-kata), mengecam, membidas (dengan kerasnya): ...

[121] According to *Kamus Dwibahasa Oxford Fajar Inggeris - Melayu, Melayu - Inggeris (Edisi Ketiga 2001)*, the term "selar" in English, means "brand; mark of identification made with hot metal; menyelar. brand; mark with a brand; defame; attack the good reputation of". All these words are words which carry strong impressions or meanings. In fact, one of the meanings to the word "selar" used as a noun is that it is a "branding-iron"; and when that same word is used as a verb, "selar-menyela", it means "to blame or accuse one another" - see *Kamus Lengkap* (Edisi Cetak Semula 1990)

[122] Each of the above meanings are the natural and ordinary meanings of the term "diselar". In *Gordon Berkeley Jones v. Clement John Skelton* [1963] 1 WLR 1362, the Privy Council held that:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning; any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words.

[123] The choice of the term is obviously deliberate by the fourth defendant, intending the same to be sensational and headline grabbing of attention following its understanding of the first defendant's comments. The word "diselar" is not reasonably capable of any positive meaning, naturally or otherwise. Consequently, we are in no doubt that an ordinary and reasonable viewer would understand the impugned broadcast to convey the ordinary and natural meaning that the plaintiff is strongly criticised, branded, censured or admonished for doing something wrong or for unbecoming conduct or action. The impugned broadcast is certainly reasonably and objectively capable of the meanings complained of by the plaintiff; it would indeed lower the estimation of the plaintiff in the eyes of the TV audience of the fourth defendant.

[124] Further, consistent with para. 11A of the statement of claim, it is clear from the above that the impugned broadcast includes the first defendant's impugned remarks and comments. Those impugned comments were found to be defamatory by the learned judge. Yet, in the context of the impugned broadcast, the learned judge found those comments were not defamatory when those comments appearing in the second part of the broadcast are set against the first part of the broadcast.

[125] We find this inconsistent finding unsustainable in law and on the facts, and plainly wrong. Once the defamatory remarks are reproduced or republished, those responsible for such republication of the defamation are equally liable in defamation. The defamation is not eroded republication is not neutralized. We are of the further view that even if there was no other publication or no other defendant, the impugned broadcast is still defamatory. We agree with the plaintiff the impugned broadcast containing both the first and fourth defendants' comments are defamatory of the plaintiff. The impugned broadcast made in the circumstances complained of, that is, with the photograph of the plaintiff and the word "diselar", does portray the plaintiff in the defamatory terms complained of at paras. 11B and 11C of the statement of claim. This was also confirmed by the fourth defendant's main witness, DW6, Mohd Ashraf bin Abdullah, the Group Managing Director TV & Radio. Contrary to the learned judge's findings, an ordinary and reasonable viewer would indeed, think worse of the plaintiff after viewing the impugned broadcast.

[126] Finally, we must add that even if the two parts of the impugned broadcast were viewed together objectively, we cannot see how the effect is any less. We cannot see how the derogatory nature of the contents in the second part are in any way neutralised by those in the first part. The first part provides context to both the first and fourth defendants' comments and actions, nothing more. The impugned broadcast remain published in permanent form and in defamatory terms. Implicit in the learned judge's findings is the acknowledgment that this second part of the transcript is defamatory, and it is.

[127] We find support for this view from several authorities including the following. In *Chalmers v. Payne* [1835] 2 Cr M&R 156, Alderson B explained about is essentially the "bane and antidote" effect upon the reading of the whole article as opposed to only reading the offending parts of an article:

> But the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and the antidote must be taken together.

[128] Learned counsel for the plaintiff argued that for this principle to succeed, it is the conclusion that must neutralise any negative or defamatory characterisation that is to be found in the first or earlier part of the impugned broadcast. In the case of the impugned broadcast, it is the reverse; it is the second part of the transcript which is harmful of the plaintiff.

[129] We agree. In *Charleston & Another v. News Group Newspapers Ltd & Another* [1995] 2 WLR 450, Lord Bridge of Harwich gave some indication on how to treat the bane and antidote argument:

> It is often a debatable question which the jury must resolve whether the antidote is effective to neutralise the bane and in determining this question the jury may certainly consider the mode of publication and the relative prominence given to different parts of it ...
>
> Whether the text of a newspaper article will, in any particular case, be sufficient to neutralise the defamatory implication of a prominent headline will sometimes be a nicely balanced question for the jury to decide and will depend not only on the nature of the libel which the headline conveys and the language of the text which is relied on to neutralise it but also on the manner in which the whole of the relevant material is set out and presented.

[130] The above two English decisions were cited with approval in *Carole Caplin v. Associated Newspapers Ltd* [2011] EWHC 1567.

[131] Like a storyline, and as already pointed out, the first part of the impugned broadcast, is only to set the context. Beyond that, it becomes irrelevant to the point of being redundant. Thus, when balancing the two parts of the impugned broadcast together, taking into account the manner in which the two parts are presented and the contents of those two parts, the re-use of the plaintiff's photo which appeared in the first part for the second part but now with the word "Diselar" emblazoned on the photo, in our opinion, an ordinary and reasonable viewer, would actually be left in a position to think worse of the plaintiff; and to think of the plaintiff in the terms complained of. In the context of television, it would be fair and reasonable to say that it is the last visual and words that will leave an imprint.

[132] With respect to learned counsel for the fourth defendant, we cannot agree with the suggestion that a reasonable man, viewing the whole news programme, will come away with the clear impression that as to be expected from a seasoned advocate, the plaintiff was simply advancing his client's interest as far as possible, carrying out his duties as a defence counsel, with great distinction; and that where he had to be robust in attacking the police, he did so, without fear or reservation. We are in no doubt, as was the trial judge, that the first defendant was not just expressing an opinion as to the effect or implication of the plaintiff's vigorous cross-examination of the police witness; he had made a scathing, unwarranted and unprovoked criticism of the plaintiff, without even being in court to be aware of the proceedings. Such criticism has far exceeded the realm of reasonable opinion and objectivity. We are of the opinion that viewed as a whole, the plaintiff's complaints further do not pertain to the deployment of the word "diselar" or to the display of his photograph alone but also to the total comments that appear in the transcripts as pleaded.

[133] Consequently, we are of the view that the learned judge has fallen into grave error in this respect. The learned judge was plainly wrong in dismissing the plaintiff's claim against the fourth defendant. The decision of the learned judge against the fourth defendant is therefore set aside.

[134] The principal defences relied on by the fourth defendant are qualified privilege and fair comment, including the defence of absolute privilege under s. 11 of the Defamation Act 1957. This was not addressed by the learned judge since the claim was dismissed against the fourth defendant.

[135] The essence of the fourth defendant's defence is that the impugned broadcast was a reflection of their responsible journalism where the impugned broadcast was published in the public interest. In *Adams v. Ward* [1917] AC 309, this defence of qualified privilege was explained in the following terms:

> A privilege occasion is an occasion where the person who makes the communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.

[136] The law on qualified privilege is settled from the decisions of the Federal Court in *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee* [2015] 8 CLJ 477, and the Court of Appeal decisions in *Dato' Sri Dr Mohamad Salleh Ismail & Anor v. Nurul Izzah Anwar & Anor* [2018] 9 CLJ 285; [2018] 5 MLRA 509; *Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors* (*supra*). In fact, in *Dato Sri Dr Mohamad Salleh Ismail & Anor*, the Court of Appeal puts it quite succinctly as thus:

> [55] A *defence of qualified privilege is founded on the need or duty on the part of the alleged defamer to impart information to the public at large and that there is a duty on the part of the public to receive that information.* In a defence of qualified privilege, unlike justification, truth is not a pre-requisite but it can only succeed if there is no malice in such publication. If untrue defamatory allegations are published on an occasion of privilege, they will be protected from a claim for defamation. Although the law of defamation exists to protect reputations, it is recognised that in particular situations it is to the benefit of society generally for people to be able to communicate without fear of being sued for defamation. This is so despite the risk that a person's reputation will be damaged and they will not be able to restore it by bringing a claim for defamation. Its rationale resides in the wider consideration that a general public good in such exercise overrides the need to protect individual reputation.
>
> (emphasis added)

[137] Where there is no interest or duty on the part of the public to receive that information, the burden of proof which lies with the fourth defendant, is not discharged, and the defence is thereby, unavailable to the fourth defendant - see *Jameel v. Wall Street Journal* [2006] 4 All ER 1279 and *Flood v. Times Newspaper Limited* [2012] UKSC 11.

[138] In the seminal decision of *Reynolds v. Times Newspaper Ltd & Others* [2001] AC 127, the House of Lords acknowledged that this defence of qualified privilege was available to the media. That decision, as submitted by learned counsel for the fourth defendant "marked a significant milestone for press freedom against defamation actions."

[139] We have no argument with that line of submission, that where media or press defendants raise the defence of qualified privilege, the thrust of their contention is that qualified privilege is accorded to the media or press as some degree of protection for their responsible journalism. The availability of this defence to such defendants was discussed in *Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd* [2010] 7 CLJ 885, and we agree with the views expressed therein:

> ... the *Reynolds* privilege was considered and applied by the High Court in the case of *Tan Sri Dato Tan Kok Ping v. The New Straits Times* [2010] 3 CLJ 614. For myself, I would hold that this new defence is available to the defendants. I think we need to move with the times and we also need to view the situation with today's eyes. A number of countries with common law traditions comparable to those of Malaysia have moved in recent years to modify the law of defamation to provide greater protection for communication on matters of public interest. The *Reynolds*' privilege represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Malaysian society. It is clear that the law has begun to shift in favour of broader defences for press defendants most prominently in England and Canada but also in Australia.

[140] But, that defence is extended only where the principles or factors laid down by Lord Nichols in *Reynolds v. Times Newspaper Ltd & Others* have been met. That defence is predicated on public interest and responsible journalism; that the media has a duty to disseminate information of public interest. In *Jameel*'s case where Wall Street Journal's defence based on the *Reynolds*' principles was allowed, Lord Hoffman explained:

> ... Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputation of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved.

[141] The following is a list of matters to be taken into account in determining whether the defence of qualified privilege should be accorded because responsible journalism is practiced. However, as cautioned by Lord Nichols, "[T]he weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound ...":

(i) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.

(ii) The nature of the information, and the extent to which the subject matter is a matter of public concern.

(iii) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

(iv) The steps taken to verify the information.

(v) The status of the information. The information may have already been the subject of an investigation which commands respect.

(vi) The urgency of the matter. News is often a perishable commodity.

(vii) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

(viii) Whether the article contained the gist of the plaintiff's side of the story.

(ix) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

(x) The circumstances of the publication including the timing.

[142] Although the above views were expressed in the context of publications in newspapers, there is no reason why the same principles would not apply to television broadcasts such as the impugned broadcasts. That is only the medium of publication and it is one which is permanent and reaches perhaps, even a larger section of the public than do newspapers; and certainly even a far speedier mode. In any case, the rate of development of technology today makes it irrelevant to draw any distinction as no useful purpose is achieved.

[143] Learned counsel for the fourth defendant submitted that in the circumstances of this case, the requirement of reciprocity of duty and interest between the maker of the impugned broadcast and the person to whom it was made, was fulfilled. It was further submitted that the publication was made in good faith, honestly and without malice. Learned counsel added that because the fourth defendant practices responsible journalism, verification with the plaintiff was not required before the impugned broadcast was published, or in this case, aired over prime time news.

[144] It is evident that the primary element that must be fulfilled before the defence of qualified privilege is available to the fourth defendant is the establishment of the public interest. At para. 16 of its re-amended defence, the fourth defendant provided their best particulars in support:

(a) The Sosilawati matter concerns the most grave and serious accusation that can be made against a practising Advocate and Solicitor as it involves murder, deception, greed and etc.

(b) Such accusations strike at the very core of the ethical and professional position of an Advocate and Solicitor in whom the members of the public repose trust and confidence.

(c) The position of an Advocate and Solicitor is a position of trust and confidence and this extends to various relationships and transactions including the administration of justice.

(d) As such, the accusations of the insidious conduct on the part of an Advocate and Solicitor including murder, deception and etc. are matters of public interest.

(e) The fourth defendant as a responsible and reputable media organization was under a duty to publish such matters of public interest and the members of the public have a corresponding interest in receiving such reports.

(f) The fourth defendant in the discharge of its public responsibility, published the news programme in good faith, without malice and acting reasonably and responsibly at all time in the production and publication of the programme.

(g) In the circumstances, the news programme published by the fourth defendant is protected by qualified privilege.

[145] At para. 17, the fourth defendant further cited *Reynolds*' public interest defence, relying on the same particulars as found in para. 16 and amplified at para. 17 itself. In particular, the fourth defendant pleaded:

(a) The subject matter of publication was a matter of public interest and in this regard, the fourth defendant refers to and adopts the particulars pleaded in paragraph 16 above.

(b) Further, the fourth defendant exercised responsible journalism in the production and presentation of the news programme over its TV channel on 16 August 2011 and in particular the fourth defendant avers and will contend as follows:

(i) The subject matter of the news programme was taken from Court proceedings involving the Trial in the Sosilawati matter. As such, the source of the programme was reliable.

(ii) Alternatively, the subject matter of the news programme was taken from interviews conducted by the press with the first defendant who is and was at all material times a current member of Parliament for the ruling party and as such, public statements made by such a member of Parliament could reasonably be taken seriously and considered to be newsworthy.

(iii) The fourth defendant presented the news programme in a fair and accurate manner without sensationalizing the programme although the subject matter itself was inherently sensational.

(iv) The fourth defendant in presenting the news programme did not attribute or suggest any blameworthiness or guilt on the part of the accused or wrongdoing on the part of counsel.

(v) The news programme included a report of the position taken by the plaintiff as defence counsel in suggesting that the investigative process by the police was defective and left much to be desired.

[146] On this, we must remind that our views expressed earlier in respect of this same defence relied on by the second and third defendants, apply equally here. If the fourth defendant published by airing the defamatory material "recklessly; without considering or caring whether it be true or not", then this defendant, like the second and third defendants, will "be treated as if he knew it to be false".

[147] Returning then to the defence, it would be fair to say that paramount is the establishment of a news item or programme which is not merely newsworthy but which is of public interest. Pursuant to paras. 16 and 17, the fourth defendant claims that the subject matter of the news programme is of public interest, specifically, it is the "accusations of the insidious conduct on the part of an advocate and solicitor including murder, deception and etc. are matters of public interest". And, when the first defendant, a Member of Parliament for the ruling party makes a statement on that subject matter, the fourth defendant claims that such statement "could reasonably be taken seriously and considered to be newsworthy."

[148] We opine that while we are prepared to accept that the subject matter emanating from the Sosilawati murder trial is of public interest in the terms relied on by the fourth defendant, we are not at all, inclined to accept the other half of the proposition, that when a view or statement is expressed on that subject matter by a Member of Parliament, whether of the ruling party or otherwise, that statement "could reasonably be taken seriously and considered to be newsworthy." In our view, it depends entirely on the facts and circumstances of the statement expressed including the ten *Reynolds*' principles; more realistically and sensibly, it depends on the contents of the statement. As we have seen in this appeal, the contents of the statement issued by the first defendant, a Member of Parliament, is entirely defamatory and indefensible. It would be disastrous for any court to accept the proposition of the fourth defendant, without more. Members of Parliament, like any other member of society, may have feet of clay.

[149] Furthermore, when the transcript is examined, it becomes apparent that it is not the subject matter which is being criticised, or even the accused or what the responses of the witnesses were, as that treads into concerns of *sub judice*. The criticisms are entirely of the plaintiff.

[150] For the same reasons, we also cannot agree with the fourth defendant that there is basis for any honest belief in what was broadcasted in the impugned broadcast. After all, the fourth defendant had only one source, the first defendant. Thus, while the subject matter may concern a matter of public interest, what is informed to the public must relate to that matter.

[151] We add that we cannot accept the fourth defendant's argument that because of the plaintiff's impressive credentials and particular prominence at the criminal litigation bar coupled with the intensive and sensational trial that had attracted public comments, comments and criticisms from the first

defendant, a Member of Parliament, was to be expected. And, when such criticisms are made, and reported by the fourth defendant, "the ordinary reasonable man will not think worse of the plaintiff." A

[152] This line of submissions appear to have found favour with the learned judge. With respect, we cannot agree with the learned judge that any counsel handling a criminal case, especially one that is as high profile as the Sosilawati murder trial, must expect and accept criticism over or of, his conduct or handling of the trial. In other words, criticism is expected. And, so when there is in fact criticism, the "ordinary reasonable man will not think worse of the plaintiff." This view is in contradiction of the earlier view reached when deliberating of the claim against the first three defendants. B C

[153] Given the seriousness of the criticisms or censuring by the first defendant; the stature of the plaintiff; the nature of the allegations made against such a senior and reputable counsel; the tone of the criticisms; the fact that it was the first defendant who approached the fourth defendant and not the other way round and the relationship of the first defendant with DSAI; the lack of urgency in the news, we are fully convinced that it was beholden on the fourth defendant to take steps to verify the information given by the first defendant. Since the first defendant was not in court at the material time, it was necessary that the fourth defendant take the minimum step of verifying with the plaintiff. Instead, the evidence indicates a reckless disregard for the truth, with the fourth defendant adopting the first defendant's comments and giving it underserved heightened attention. D E

[154] Contrary to the submissions of the fourth defendant, we are of the view that the principal elements of qualified privilege have not been satisfied and the defence is not available to the fourth defendant. The *Reynolds*' principles, as identified, have not been met leaving us with the single conclusion that the fourth defendant has not practised responsible journalism on the facts and circumstances. F

[155] For the same reasons, we find that the defence of fair comment, on the principles as earlier discussed in relation to the second and third defendants, are equally not available to the fourth defendant. The learned judge was plainly erroneous in not properly evaluating this part of the plaintiff's claim and we are compelled to intervene. The claim of the plaintiff against the fourth defendant was proved on a balance of probabilities and therefore ought to have been allowed. The plaintiff's appeal is of merit and is consequently allowed. G H

Damages

[156] The learned judge ordered a total sum of RM350,000 as compensatory damages to be paid; the first defendant to pay the sum of RM150,000 while the second and third defendants to pay the sum of RM200,000. We agree that these sums are fair and adequate. I

[157] In relation to the fourth defendant, taking into account the factors already discussed earlier, we are of the view that the sum of RM200,000 as awarded against the second and third defendants, should also be ordered against the fourth defendant; and we so order.

Conclusion

[158] For the reasons discussed above, we make the following orders:

(i) Appeal by the first defendant in Civil Appeal No. W-02(NCVC)(W)-1742-10-2015 is dismissed with costs as we see no merits in the appeal. The decision of the High Court is affirmed.

(ii) Appeal by the second and third defendants in Civil Appeal No. W-02(NCVC)(W)-1640-10-2015 is also dismissed with costs as we are also of the unanimous view that there are no merits in the appeal. The decision of the High Court is affirmed.

(iii) Appeal by the plaintiff in Civil Appeal No. W-02(NCVC)(W)-1679-10-2015 is allowed with costs as we are of the unanimous view that this appeal has merits. The decision of the learned judge in respect of the plaintiff's claim against the fourth defendant is set aside. We agree with the plaintiff that the learned judge is in error and we invoke our appellate powers in setting aside that part of the decision in respect of the fourth defendant. We find that the plaintiff has proved his case against the fourth defendant and that the defences relied on are not available. It therefore follows that the claim must be allowed and we order the fourth defendant to pay the plaintiff general damages of the sum of RM200,000 together with interest at the rate of 5% per annum from the date of judgment to the date of realisation.